Adm. law Judge Decisions Report

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Federal Labor Relations Authority

Washington, D.C. 20424

Number 4

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

January 22, 1982

UNFAIR LABOR PRACTICE CASE

2-CA-609 (January 15, 1982)

438th Air Base Group, McGuire Air Force Base, U.S. Air Force, Department of Defense and American Federation of Government Employees, Wm. G. Baille, Jr., Local 1778, AFL-CIO

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* This report series includes decisions and orders of FLRA administrative law judges to which no exceptions were filed with the Authority within the prescribed time limit. In accordance with section 2423.29(a) of the Authority's rules and regulations, as amended (46 Fed. Reg. 40674 (1981)), the findings, conclusions, and recommendations in such ALJ decisions constitute, without precedential significance, findings, conclusions, decisions and orders of the Authority.

Y 3. F 31/21-3:

[2-CA-609]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

438th AIR BASE GROUP,
McGUIRE AIR FORCE BASE,
U.S. AIR FORCE, DEPARTMENT
OF DEFENSE

(Respondent)

and

Case No. 2-CA-609

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
WM. G. BAILLE, JR.,
LOCAL 1778, AFL-CIO

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on October 13, 1981, finding that the Respondent had engaged in the alleged unfair labor practices and recommending that the Respondent cease and desist therefrom and take certain affirmative actions.

No exceptions to the decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's rules and regulations, as amended (46 Fed. Reg. 40674 (1981)), the findings, conclusions, and recommendations in the decision of the Administrative Law Judge constitute, without precedential significance, the finding, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., January 15, 1982

James J. Shepard

James J. Shepard, Executive Director

[2-CA-609]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
SUITE 416 - 1111 20TH STREET, N.W.
WASHINGTON, D.C. 20036

. . . .

438TH AIR BASE GROUP, MCGUIRE AIR
FORCE BASE, U.S. AIR FORCE,
DEPARTMENT OF DEFENSE

Respondent

and

Case No.: 2-CA-609

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, WM. G. BAILLE, JR.
LOCAL 1778, AFL-CIO

Charging Party

. . . .

James L. Linsey, Esquire
Nicholas J. Angelides, Esquire
For the Respondent

James E. Petrucci, Esquire
Margaret A. Sipser, Esquire
For the General Counsel

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This case arose pursuant to the Federal Service Labor-Management Relations Statute, 5 U.S.C. §7101 et seq., (the Statute), as a result of an unfair labor practice complaint filed by the Regional Director, Region Two, Federal Labor Relations Authority, New York, New York, against the 438th Air Base Group, McGuire Air Force Base, U.S. Air Force, Department of Defense (Respondent), based on a charge filed by the American Federation of Government Employees, Wm. G. Baille, Jr. Local 1778, AFL-CIO (Charging Party or Union). The complaint alleged, in substance, that

Respondent violated sections 7114(b)(4) and 7116(a)(1), (5), and (8) of the Statute by failing to furnish the Charging Party data it requested concerning amounts of official time spent on Union activities by officials and members of the Charging Party.

A hearing was held in this matter at McGuire Air Force Base, New Jersey. Respondent and the General Counsel, FLRA were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. Based on the entire record herein, including by observation of the witnesses and their demeanor, the exhibits and other relevant evidence adduced at the hearing, and the briefs, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

Background

The Union is the exclusive representative of an appropriate unit of Respondent's employees. The Union and Respondent were, at all material times, parties to a collective bargaining agreement. Under Article 8, Section 3 of the parties' collective bargaining agreement, Union officials "shall be afforded reasonable and sufficient official time to perform their representational duties." (Joint Ex. 1).

During the period 1979 to the summer of 1980 there was, and continues to be, a continuing controversy between the parties as to what constitutes "reasonable and sufficient official time" under the agreement. (Tr. 18, 20-21, 113-114, 179). Management had sometimes referred to the "DTL06" time code as a basis for contending that an employee had used "sufficient" official time. (Tr. 18). An unfair labor practice complaint relating to the denial of official time to Kieth Van Laarhoven was filed April 11, 1979, dismissed by the Regional Director February 26, 1980, appealed by the Union on March 19, 1980, and the dismissal was affirmed by the General Counsel on May 29, 1980. (General Counsel's Ex. 9; Tr. 97-99). There was a further exchange of correspondence between the Union and Respondent in August 1980 concerning the release of Mr. Van Laarhoven on official time. (General Counsel's Exh. 3, 4; Tr. 21-23).

In or about June of 1979, the Union submitted to Respondent contract proposals for upcoming negotiations on a successor agreement. (Tr. 18, 44, 84-86. 108, 110; Respondent's Ex. 1). Included in the "package" of contract proposals were specific proposals concerning official time (1) for union officials, (2) for training of union representatives, and (3) for shop stewards. (General Counsel's Ex. 6, 7, 8; Tr. 86). No bargaining on the official time proposals had taken place and no agreement had been reached on these issues as of March 24, 1980.[1] (Tr. 81-82, 86-87, 155-156, 177).

The Request

On March 24, 1980 Herman A. Winters, Jr., local union president, sent a letter to Orlando Bergerson, base labor relations officer, which stated, in part, as follows:

> Subject: Time Accounting
>
> 1. This Local requests copies of all records of time spent on union activities and time spent by unit members which is accountable under DTL06.
>
> 2. This information is necessary for the union to properly represent the unit. Please respond within ten (10) work days of receipt of this letter. (General Counsel's Ex. 2).

Mr. Winters knew that such time accounting involved code DTL06. He was under the impression that the same DTL06 information was also transferred to an Air Force Form 3131. He did not know that DTL06 and Air Force Form 3131 involved two separate time accounting systems. (Tr. 34-37).

The Records Maintained

McGuire Air Force Base maintains two independent systems for recording the time Union representatives spend on official time. One system is under a computerized maintenance cost system covering over 1,700 military and civilian personnel. Employees engaged in anything other than direct labor have such other activity recorded by codes on AFTO 349 forms for use in the computerized maintenance cost system. (Respondent's Ex. 4; Tr. 117). A DTL06 code has been used since early 1978 to record the official time spent away from a work center by union officials and shop stewards on union duties. Code DTL06 is not used for other unit employees who may utilize time to visit the union. (Tr. 118-119, 127). The entry of code DTL06 time on form 349 can be performed by an employee, the employee's supervisor, or job supervisor. (Tr. 118). If a supervisor prepares and processes the form 349, it would be the supervisor's determination that the time spent by the employee was accountable under code DTL06. (Tr. 129).

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[1] The parties encountered difficulty in attempting to reach agreement on official time during ground rules negotiations which began in June of 1979 and culminated in a decision of the Federal Service Impasses Panel (FSIP) on June 25, 1980. (Tr. 178-179). One of the issues presented to the FSIP was whether the agency's or Union's proposals on use of official time for negotiating the successor contract should be incorporated into the ground rules agreement. (Tr. 178-179). "Intent and meaning" sessions began in or about July 1980. The last session prior to the hearing was on July 24, 1980. (Tr. 156).

The information on the 349 forms is transferred from the form to a computer card by the computer card punch office. The employee identification number is not transferred to the computer card. (Tr. 121). The 349 forms are then returned to the various workshops for a 60-day retention period. There are about 25,000 of them on file at any one time.

The computer cards are delivered to data automation for processing. Data automation retains the maintenance cost system information for approximately two years. (Tr. 121-123). The information is retained on 14 reels of computer tape. (Tr. 135).

It is possible to retrieve from the computer only a lump sum of time spent by the whole group of union officials. In order to retrieve this lump sum, the maintenance production control office would have to write four separate base level inquiry programs -- one program for each six-month group of computer tapes for processing by data automation. Since data automation does not process requests involving 14 computer tape reels for a two-year period during its normal workweek such a request would have to be run on a weekend. In an example, it took the computer nearly one hour to search one tape for one month of DTL06 information. Each six-month period would take quite a few hours of computer time. (Tr. 131). The finished print-out would not be large. (Tr. 132-133). However, in order to retrieve DTL06 records with the employees' identification, it would be necessary to obtain them from each work center in the maintenance complex. These forms are maintained for only two months. (Tr. 121-123).

A second system of accounting for the official time used by union officials and shop stewards is maintained on Air Force Form 3131 under the guidance of the labor relations office. This system is unrelated to the DTL06 system. Unlike the computerized DTL06 information stored in data banks at data automation, the 3131 forms are completed by first line supervisors. It is discretionary with individual supervisors whether or not to record official time used by stewards, depending on how much time a particular steward spends on union activities. The forms are forwarded at the end of each month to the labor relations officer, Mr. Orlando Bergerson, for filing. As there are presently ten union officials, Mr. Bergerson receives 120 of these forms each year. Mr. Bergerson prepares a summary of this information on an annual basis. (Tr. 146-149, 174-176; Respondent's Ex. 6).

Handling of the Request

Mr. Orlando Bergerson, Respondent's labor relations officer, received the Union's March 24, 1980 letter on March 25, 1980. (Tr. 160). He knew that time used by unit members other than union officials would not be maintained in the DTL06 system; however, on March 26, 1980, he telephoned Jay P. Williams, chief of production analysis, to ascertain what else would be involved in obtaining other records of DTL06 accountability. Mr. Bergerson telephoned the union office the next afternoon, March 27, 1980, and spoke with a female who answered the phone. Mr. Bergerson acknowledged the Union's letter, and stated that Mr. Williams had "indicated that if you want copies of everything, there will be thousands and thousands of 349's and punch cards and then the final computer product. If you get thousands and thousands of copies of them it will probably cost a considerable amount of money." According to Mr. Bergerson, the individual said, "Well, I don't really know, I'll have to check and find out if it was really wanted and call back." No one from the Union ever called back, and Bergerson had no further communication with the Union until after the charge was filed. After the charge was filed, Mr. Bergerson wrote the Union in November 1980 stating that he felt the request had been abandoned. He requested the Union's response "in accordance with your secretary's telecon with me on 27 Mar 80" and "Your desires for records under both accounting systems and we will respond promptly to your request". (Tr. 160-171); Respondent's Ex. 9, 10).

Mr. Bergerson normally speaks with the Union secretary who answers the phone. He frequently uses the secretary to relay messages to Union officials, and they relay messages to him. Mr. Bergerson has relied on the word of the Union office secretary most frequently in the past in scheduling labor-management meetings and arbitration hearings. (Tr. 149-151, 185-187).

Mr. Bergerson testified that he could not identify the voice on March 27, 1980 due to "a lot of background noise" on "that particular date." However, he admitted on cross-examination that he had taken the position in the past that he spoke on this occasion with Claudia P. Storicks, the Union office secretary, with whom he has had frequent conversations over the years. (Tr. 187). The Union has admitted in a prior unfair labor practice case that Storicks, as office secretary, is an agent of the Union. (Tr. 152-153, Respondent's Ex. 7, 8). She has exercised authority on behalf of the Union to schedule meetings, request forms, and request other information relevant to cases being handled by Union officials. (Tr. 65, 215-216, 218-220). However, Storicks was on sick leave on March 27, 1980 and was not present at the Union office. (Tr. 54, 59, 211, 214-215; General Counsel's Ex. 5).

Dawn Miller, a high school student in a cooperative work-education program, who began part-time employment with the Union on March 21, 1980, was present at the Union office on March 27, 1980 from approximately one p.m. until four p.m.[2] One of Miller's duties, in common with the full-time secretary, was to answer the phone, accept communications for Union officials, write the messages down, and pass them on to Union officials. (Tr. 55, 213, 218). However, Miller was not given authority to answer questions, or present proposals on behalf of the Union concerning bargaining issues. (Tr. 61, 212-213, 216).

Union president Winters did not receive any message from Mr. Bergerson, or any other reply or request for clarification from Respondent prior to the filing of the charge.

Respondent's Answer admitted that the data requested by the Union was maintained in the regular course of business, was reasonably available, and did not constitute guidance, advice, counsel or training provided for management officials or supervisors. Respondent's Answer stated that Respondent lacked information sufficient to admit or deny that the information sought was necessary for full and proper discussion, understanding and negotiations of subjects within the scope of collective bargaining. (General Counsel's Ex. 1(b) and 1(c)).

Handling of Prior Requests for Voluminous Records

Air Force Regulation 12-30 of February 19, 1975 governs the disclosure of Air Force records to the public under the Freedom of Information Act and provides a schedule of fees for searching and duplicating records under that Act. (Respondent's Ex. 11). Where the Union has requested voluminous information under the Freedom of Information Act in the past, Respondent has replied in writing to the requests, advising the Union that its agreement to pay an approximate fee would be required prior to the furnishing of the information. (Respondent's Ex. 15, 17). In some cases the fee has been paid. (Respondent's Ex. 13, par. 6). In other cases the Union's request has been abandoned. (Tr. 207-208). Air Force Regulation 12-32 of February 13, 1973 governs the schedule of fees for copying, certifying, and searching records and other documentary material under other than the Freedom of Information Act. (Respondent's Ex. 12; Tr. 200). Prior to the enactment of the Statute, the Union paid an assessment under 12-32 under protest in 1977 and requested to negotiate the payment of fees. (Tr. 204). The Union was advised in June 1977 that the schedules of fees under Air Force Regulations 12-30 and 12-32 were not negotiable. The Union in late 1977 then requested a waiver of fees through channels. Headquarters, Air Force decided on December 1, 1977 that Executive Order 11491 was silent on the matter, and the question of waiver of fees must be determined on a case by case basis. (Respondent's Ex. 13, Attachment 1 Dec 1977). The record does not reflect that any request for negotiations concerning the handling of information requests, including the question of the payment of fees, has been made since the enactment of the Statute.

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[2] Ms. Miller ceased her employment with the Union May 23, 1980. During the first day of the hearing, Respondent spoke with Miller, who indicated that she would be available to testify the following morning. (Tr. 88-89). Miller was not called as a witness.

Discussion, Conclusions, and Recommendations

The complaint alleges that Respondent violated 7114(b)(4)[3] and 7116(a)(1), (5), and (8) of the Statute by failing to furnish the Charging Party data it requested concerning amounts of official time spent on Union activities by officials and members of the Charging Party. The General Counsel contends that the Union made a proper request for "necessary" information for the purpose of formulating and preparing proposals at the bargaining table and determining whether or not to file a potential grievance, and that Mr. Bergerson's conversation with an unknown female at the Union office does not show that the Union ever knowingly and deliberately acted to withdraw its request.

Respondent contends that the Union's initial request was not so specific and unambiguous as to compel compliance; but, even if it was, Mr. Bergerson's telephone call properly put the burden on the Union to clarify its request and agree to pay fees as a condition to Respondent's retrieval and release of the information.

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[3] Section 7114(b)(4) of the Statute provides that the duty of an agency and an exclusive representative to negotiate in good faith includes the obligation,

> "(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data
>
> > (A) which is normally maintained by the agency in the regular course of business;
> >
> > (B) which is reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining; and
> >
> > (C) which does not constitute, guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining; . . ."

The Union made a proper initial request for the information. In view of the Union's pending contract proposals concerning official time and the parties' continuing controversy over the use of official time, Respondent is reasonably charged with knowledge that the Union's request sought data bearing directly on mandatory subjects of bargaining and directly relevant and necessary to the administration of the parties' agreement. Data of this nature were "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining." Section 7131(d) expressly authorizes the agency and the exclusive representative to agree on certain circumstances for the granting of official time to employees representing an exclusive representative and to other employees in an appropriate unit.

Respondent alone was in possession of important facts as to how its official time records were maintained. The Union's limited information in this respect explains the nature of its request, which might otherwise appear to be a broad request drawn with deliberate ambiguity and unconcern for Respondent's needs for specificity. The circumstances reveal that the Union was requesting data and enlightenment in an area of great concern. The request was certainly sufficient to trigger a response from Respondent and an obligation to negotiate in good faith concerning compliance with the request.

The duty to supply information and the type of disclosure that will satisfy that duty turn on the circumstances of the particular case. Cf. Detroit Edison Co. v. NLRB, 440 U.S. 301, 100 LRRM 2728 (1979). Where the employer has legitimate, good faith objections to furnishing the information sought on grounds of burdensomeness, unwieldiness of the form in which the information is requested, expense, or other considerations, it must advise the union of such objections at the time the information is requested. The union must be given an opportunity to discuss how the data it needs may be supplied in a less burdensome form. Cf. J.I. Case Co. v. NLRB, 253 F. 2d 149, 41 LRRM 2679 (7th Cir., 1958). Likewise, the employer must be provided an opportunity to provide information sufficient to meet the union's needs by alternative arrangements and in a mutually satisfactory form. It is only where such problems cannot be worked out, after some further minimal effort at the bargaining table, that the problem is properly presented to the Authority and the courts. Cf. Soule Glass and Glazing Co. v. NLRB, 107 LRRM 2781, at 2801-2807 (1st Cir., 1981) and cases cited therein; Emeryville Research Center, Shell Development Co. v. NLRB, 441 F. 2d 880, 77 LRRM 2043 (9th Cir., 1971).

The issue here is whether Respondent, in accordance with its obligations under section 7116(b), gave the Union an adequate response and an opportunity to work out mutually satisfactory terms at the bargaining table by means of Mr. Bergerson's telephone call to an unknown person in the Union office. I conclude that Respondent did not.

First, there is insufficient evidence to show that Respondent had a past practice of responding to the Union's written requests for information in this manner. The full-time secretary, Claudia P. Storicks, who sometimes specifically requests and receives by telephone information relevant to cases being handled by Union officials, did not participate in the discussion in question. While other Union secretaries receive and relay messages, no past practice was shown of their receiving Respondent's oral responses to written information requests. Rather, it was only shown that such secretaries have been most frequently utilized in the past to simply schedule labor-management meetings and arbitration hearings. The record also reflects that, in the past, when Respondent insisted upon the payment of fees in advance for voluminous information, it replied in writing to the requests, advising the Union that its agreement to pay an approximate fee would be required. The Union did not always decline to pay and abandon the request. With respect to use of Union secretaries for the purpose of merely relaying messages, it is noted that, in this instance, Mr. Bergerson did not first ascertain that Mr. Winters, or another appropriate Union official was not in the office or otherwise unavailable, and then ask that the call be returned, nor did he specifically request the secretary to relay a message to the appropriate official. Instead, Mr. Bergerson simply called the Union office, and when an unfamiliar and unidentified female voice answered, he proceeded to give Respondent's "answer", the gist of which was "if you want copies of everything . . . it will cost a considerable amount of money."

Not only was the manner of response not justified by a past practice, but the response itself was incomplete. It appears from the record that, in order for the problems to be worked out with some minimal effort at the bargaining table, Respondent needed to provide the Union an initial response which included much the same kind of information Respondent provided the Authority during the course of the hearing, namely: (1) that, in response to the request, no records at all were maintained under DTL06 concerning time spent by unit members other than union stewards or officials, as requested by the Union, (2) that the other desired information could more readily be provided by the labor relations office from the Air Force form 3131 system, maintained in the labor relations office, at much less expense and loss of time that the separate DTL06 system, (3) that if the actual DTL06 data were needed by the Union, the Union should specify, following Respondent's explanation of the system, the final product it wanted from the DTL06 system -- whether the basic form 349's and/or the punch cards and/or the computer print-out, and (4) that satisfactory arrangements would have to be worked out as to time and cost.

Section 7103(12) of the Statute defines collective bargaining in terms of the "mutual obligation" of the parties to consult and bargain in good faith. Thus, the collective bargaining relationship requires that each party deal with the other directly and in a dignified manner. See United States Air Force, Air Force Logistics Command and Local 221, AFGE, AFL-CIO, 4 FLRA No. 70 (1980); Norfolk Naval Shipyard, Portsmouth, Virginia and Tidewater Virginia Federal Employees Metal Trades Council, 6 FLRA No. 22 (1981). It is not unreasonable to expect of a party to collective bargaining that he display a degree of diligence in arranging for collective bargaining sessions when they are requested or required by intervening events comparable to that which he would display in his other business affairs of importance. Cf. J.H. Rutter-Rex Mfg. Co. Inc., 86 NLRB 470, 506, 24 LRRM 1653 (1949). This Respondent did not do. It provided an incomplete response to the Union's request and in an inappropriate manner not sanctioned by past practice. The response did not reach Union officials and resulted in a failure to furnish the information requested. It is unlikely that Respondent would have relied solely on this method of replying to a request for negotiations which it was desirous of concluding.

An adequate response to the written request for information would have enabled both parties to fulfill their respective obligations under section 7114(b) of the Statute "to be represented at the negotiations by duly authorized representatives" and "to meet at reasonable times and convenient places as frequently as may be necessary" for good faith negotiations in order to meet the Union's needs for information in a mutually satisfactory manner. In my view, Mr. Bergerson's telephone call was insufficient compliance with Respondent's obligations under section 7114(b), notwithstanding the apparent fact that the Union never made a formal follow-up inquiry as to the status of its request prior to filing the unfair labor practice charge.4/

4/ There is no intent here to suggest that an oral response to a written request for information would never be proper, or that the calling party is always to blame if an inefficient secretary mishandles a message. Only the issues in this case have been addressed in light of the facts and the requirements of the Statute. The parties may, of course, use the collective bargaining process to eliminate potential problems regarding the manner, to whom requests for data and responses thereto may be directed, and the details of payment. See Army and Air Force Exchange Service (AAFES), Lowry Air Force Base Exchange, Ft. Carson, Colorado and American Federation of Government Employees, AFL-CIO, Local 2865, decision of Administrative Law Judge Alan W. Heifetz, April 24, 1981 (regarding payment for records).

Having concluded that Respondent violated section 7114(b)(4) and 7116(a)(1), (5) and (8) of the Statute, as alleged, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Authority hereby orders that the 438th Air Base Group, McGuire Air Force Base, U.S. Air Force, Department of Defense shall:

1. Cease and desist from:

(a) Failing or refusing to furnish to the American Federation of Government Employees, Wm. G. Baille, Jr. Local 1778, AFL-CIO, available data concerning official time requested by it on March 24, 1980, and, upon request and, to the extent not prohibited by law, such other data which is normally maintained by the agency in the regular course of business; which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.

(b) Failing or refusing to consult or negotiate in good faith with the American Federation of Government Employees, Wm. G. Baille, Jr. Local 1778, AFL-CIO, or any other exclusive representative of its employees, as required by the Federal Service Labor-Management Relations Statute.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to carry out the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Furnish to the American Federation of Government Employees, Wm. G. Baille, Jr. Local 1778, AFL-CIO, available data concerning official time requested by it on March 24, 1980 and, upon request and, to the extent not prohibited by law, such other data which is normally maintained by the agency in the regular course of business; which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.

(b) In the event there are legitimate, good faith objections to furnishing such data in the manner requested, promptly provide reasonable and adequate notice of same to the American Federation of Government Employees, Wm. G. Baille, Jr. Local 1778, AFL-CIO, or any other exclusive representative of its employees, and afford such representative the opportunity to negotiate in good faith to the full extent consonant with law.

(c) Post at its facilities copies of the attached Notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Commander, 438th Air Base Group, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to 5 C.F.R Section 2423.30 notify the Regional Director, Federal Labor Relations Authority, Region Two, New York, New York, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: October 13, 1981
Washington, D.C.

[2-CA-609]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to furnish to the American Federation of Government Employees, Wm. G. Baille, Jr. Local 1778, AFL-CIO, available data concerning official time requested by it on March 24, 1980, and, upon request and, to the extent not prohibited by law, such other data which is normally maintained by the agency in the regular course of business; which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.

WE WILL NOT fail or refuse to consult or negotiate in good faith with the American Federation of Government Employees, Wm. G. Baille, Jr. Local 1778, AFL-CIO, or any other exclusive representative of our employees, as required by the Federal Service Labor-Management Relations Statute.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL furnish to the American Federation of Government Employees, Wm. G. Baille, Jr. Local 1778, AFL-CIO, available data concerning official time requested by it on March 24, 1980, and, upon request and, to the extent not prohibited by law, such other data which is normally maintained by the agency in the regular course of business; which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.

9

WE WILL, in the event there are legitimate, good faith objections to furnishing such data in the manner requested, promptly provide reasonable and adequate notice of same to the American Federation of Government Employees, Wm. G. Baille, Jr. Local 1778, AFL-CIO, or any other exclusive representative of our employees, and afford such representative the opportunity to negotiate in good faith to the full extent consonant with law.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Region Two, Federal Labor Relations Authority, Room 241, 26 Federal Plaza, New York, New York 10278. Telephone (212) 264-4934.

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Federal Labor Relations Authority

Washington, D.C. 20424

Number 5

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

February 5, 1982

UNFAIR LABOR PRACTICE CASES

2-CO-50 (January 28, 1982)

Local 24, NLRBU, National Labor Relations Board Union and National Labor Relations Board, Region 24

3-CA-2379 (January 29, 1982)

Marine Corps Development and Education Command and American Federation of Government Employees, Local 1786, AFL-CIO

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* THIS REPORT SERIES INCLUDES DECISIONS AND ORDERS OF FLRA ADMINSITRATIVE LAW JUDGES TO WHICH NO EXCEPTIONS WERE FILED WITH THE AUTHORITY WITHIN THE PRESCRIBED TIME LIMIT. IN ACCORDANCE WITH SECTION 2423.29(a) OF THE AUTHORITY'S RULES AND REGULATIONS, AS AMENDED (46 FED. REG. 40674 (1981)), THE FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS IN SUCH ALJ DECISIONS CONSTITUTE, WITHOUT PRECEDENTIAL SIGNIFICANCE, FINDINGS, CONCLUSIONS, DECISIONS AND ORDERS OF THE AUTHORITY.

Y 3. F 31/21-3:

[2-CO-50]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

LOCAL 24, NLRBU,
NATIONAL LABOR RELATIONS BOARD UNION

(Respondent)

and

Case No. 2-CO-50

NATIONAL LABOR RELATIONS BOARD,
REGION 24

(Charging Party)

ORDER

The Administrative Law Judge issued her Decision and Order in the above-entitled proceeding on September 29, 1981, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative actions.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (46 Fed. Reg. 40674 (1981)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusion, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., January 28, 1982

James J. Shepard

James J. Shepard, Executive Director

[2-CO-50]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
1111 20TH STREET, NW., SUITE 416
WASHINGTON, D.C. 20036

LOCAL 24, NLRBU, NATIONAL LABOR RELATIONS BOARD UNION,

(Respondent)

and

NATIONAL LABOR RELATIONS BOARD, REGION 24,

(Charging Party)

Case No. 2-CO-50

William F. Grant, Esq.
Attorney for Respondent

Michael S. Maram, Esq.
Attorney for Charging Party

Lee Mingledorff, Esq.
Attorney for the General Counsel,
Federal Labor Relations Authority

Before: ISABELLE R. CAPPELLO
Administrative Law Judge

DECISION

This is a proceeding under the Federal Service Labor-Management Relations Statute, 92 Stat. 1191 (1978), 5 U.S.C. § 7101 et seq. (Supp. III, 1979) (hereinafter referred to as the "Statute"), and the rules and regulations issued thereunder and published at 45 Fed. Reg. 3486 et seq., 5 CFR 2400 et seq.

Based on a Charge filed on January 12, with the Federal Labor Relations Authority (hereinafter, the "Authority" or "FLRA") by the Regional Director, Region 24 of the National Labor Relations Board, the Regional Director, Region II of the Authority, filed the Complaint which initiated this proceeding. The Complaint was filed on March 27.

The Complaint alleges that Local 24 of the National Labor Relations Board Union (hereinafter "Local 24" or "Respondent") has engaged in and is engaging in an unfair labor practice, in violation of Section 7116(b)(5) of the Statute,[1] by recording a labor-management meeting between Local 24 and Region 24 of the National Labor Relations Board (hereinafter, "Region 24" or the "Charging Party"), without notice to Region 24.

In it Answer, Local 24 denies that it has violated the Statute and raises three affirmative defenses: (1) any conduct which may have occurred was of a de minimis nature; (2) any unlawful conduct was fully and adequately remedied prior to the filing of the Charge; and (3) the filing of the Charge was to punish Local 24 for its resort to this Authority's processes and procedures, and thus this proceeding is a sham.

A hearing in this matter was held on June 3, 1981, in Hato Rey, Puerto Rico. The parties appeared, offered evidence, and examined and cross-examined witnesses. Respondent argued its case at the conclusion of the taking of evidence. The General Counsel and the Charging Party presented their case in briefs filed on July 17. Based upon the record made by the parties, my observation of the demeanor of the witnesses, and the oral argument and briefs of the parties, I make the following findings, conclusions and recommended order.

Findings

1. At all times material herein, the Charging Party has been an "agency" and the Respondent has been a "labor organization," within the meaning of the Statute. See Respondent's Answer to the Complaint. (GC 1(C) and (e), paragraphs 2 and 3).[2]

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[1] Section 7116(b) provides, in pertinent part, that:

> For the purposes of this chapter, it shall be an unfair labor practice for a labor organization -- . . . (5) to refuse to consult or negotiate in good faith with an agency as required by this chapter. . . .

[2] "GC refers to the exhibits of the General Counsel. Other abbreviations used herein are as follows: "R" refers to the exhibit of Respondent. "Jt" refers to the joint exhibit of the parties. Multipage exhibits are referenced by the exhibit number, followed by the page number. "TR" refers to the transcript. "GC Br" refers to the brief of the General Counsel. "CP Br" refers to the brief of the Charging Party.

2. The National Labor Relations Board Union has been the exclusive representative of all full-time and regular part-time clerical, non-professional, and professional employees in the regional, subregional, and resident offices of the National Labor Relations Board. The National Labor Relations Board Union has delegated to Respondent the authority to bargain concerning certain local personnel practices, policies and working conditions for unit employees working at the Charging Party's location in Hato Rey, Puerto Rico.

3. Awilda Morales-Fortuno has occupied the position of President of Respondent at all times material herein, and has been and is now an agent of Respondent acting on its behalf. Martin Arlook has been and is the Regional Director or Region 24, and represents management for purposes of labor-management relations in Region 24.

4. Sometime prior to the event alleged to be an unfair labor practice in this proceeding, Local 24 had filed an unfair labor practice charge with the Authority. Region 24 was the subject of the Charge. This Charge was settled by the General Counsel. The settlement required Region 24 to post a Notice to employees. This Notice was posted on December 10, 1980.3/ Local 24 appealed the decision to settle the matter; and this appeal was apparently pending during the time period here at issue.

5. Also prior to the event here at issue, Local 24 and Region 24 had several bargaining sessions about a dress code. At one session, Mr. Arlook had his secretary take typographical notes.4/ Either Ms. Morales or Mr. Valldejule,5/ Vice-President of Local 24, asked for a copy of

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3/ Dates referenced herein are all in 1980, unless otherwise specified.

4/ Mr. Arlook testified that this session was a week or 10 days before September 25. Mr. Valldejule could not recall the date of the session. Ms. Morales at first testified that this session took place some five months prior to the September 25 meeting, but later testified that she could not recall the date of the session. Mr. Arlook's secretary testified that the session took place in September. Mr. Arlook appeared to be sure in his recollection, and was corroborated by his secretary. Accordingly, I credit his testimony as to the date of this session.

5/ Spelled as "Valdijule" throughout the transcript. The Charging Party's brief and GC 3 indicates that the correct spelling should be "Valldejule."

these notes.[6] Mr. Arlook declined to share them with Local 24, commented that Local 24 could bring in as many people as it wanted for the purpose of taking notes, and pointed out that Ms. Morales, "having risen through the ranks of the clerical, is an expert shorthand taker and was there to take notes." (TR 48).

6. On September 25, Rafael Medina, an attorney in the office of Region 24, requested a meeting with the Regional Director, through Local 24, concerning the clarification of a rule that was being used at Region 24 regarding the arrival of professionals at the start of the workday. Region 24 allows employees a certain grace period in reporting to work.

7. Ms. Morales immediately wrote a note to Mr. Arlook requesting such a meeting. The note indicates that the meeting was held on September 25, between 1:15 p.m. and 2:00 p.m. See GC 3.

8. The September 25 meeting was held in the office of Mr. Arlook. Present at the meeting were Mr. Arlook, Ms. Morales, Mr. Valldejule, Mr. Medina, and Iris Fuentes, the office manager. As office manager, Ms. Fuentes monitors time and attendance of all employees. During the meeting, she participated in the discussion and took notes of the meeting for Mr. Arlook. Ms. Morales and Ms. Fuentes were seated at either end of a credenza. The credenza is 48 inches long. Mr. Arlook was seated behind his desk, with Ms. Fuentes and Ms. Morales seated to his left. His desk is 41 inches deep; and the corner nearest to Ms. Fuentes was 27 inches away from her. Ms. Morales was at the farthest end of the credenza from Mr. Arlook. Mr. Medina sat facing Ms. Morales. Mr. Valldejule sat facing Mr. Arlook.

9. On the way to Mr. Arlook's office, Ms. Morales was observed by Mr. Medina to be carrying a tape recorder in her hand, along with a yellow legal pad. The recorder was on the outside as she was walking toward his office. (TR 115). Ms. Morales had told Mr. Medina, prior to September 25, that the next time there was a meeting with the Director she was going to make a recording of it. Mr. Medina had never attended a labor-management bargaining session before; and he just assumed that Ms. Morales had permission to tape record the meeting, or that these were the ground rules.

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[6] Mr. Valldejule was not sure who asked for the notes. Mr. Arlook and his secretary testified that it was Mr. Valldejule who asked for them. Ms. Morales testified that she asked for them, but that possibly Mr. Valldejule also asked for them, after she walked out of the meeting. For the reasons stated in footnote 4, *supra*, I credit the recollection of Mr. Arlook and his secretary that Mr. Valldejule asked for the notes.

10. Mr. Valldejule knew that Ms. Morales was going to tape record the meeting of September 25. Mr. Arlook did not know it, had not been asked by Local 24 for permission to tape record it, and did not observe a tape recorder during the meeting.

11. Ms. Morales testified that she placed the tape recorder on the credenza, next to her yellow pad, when she sat down. The tape recorder is quite small, is encased in black plastic, and makes only a faint clink when activated. Ms. Morales ran the tape recorder and made doodles on her pad during the meeting. She taped the meeting so that she would have an accurate record of Mr. Arlook's position on the grace period. She has never requested a routine staff memorandum from him on the subject.

12. Mr. Arlook keeps a number of items on his credenza. Nearest to his desk he keeps a small planter containing a few plants. Next to the planter is a small picture of Mr. Arlook's son followed by two small medallions. Next to the medallions is a flat, round, glass ashtray. Because of the items on the credenza, Ms. Morales could not say that her recorder was "in plain view." (TR 177).

13 a. At one point during the meeting, all eyes focused on the credenza, when the picture of Mr. Arlook's son fell over. Ms. Fuentes and Ms. Morales both reached to catch it and put it back in place. Ms. Fuentes remembers seeing only the picture, the plant, one medallion, and the yellow pad. (TR 29). Mr. Medina noticed only the yellow pad, the ashtray, and the picture. Mr. Valldejule noticed only the picture, the tape recorder, and probably a legal pad. Mr. Arlook observed the items usually on his credenza as being there, plus a yellow pad. Ms. Fuentes and Mr. Arlook testified that there was no tape recorder on the credenza when they observed the credenza. Mr. Medina had no specific recollection of seeing a tape recorder on the credenza.

13 b. I credit Ms. Morales's testimony, corrborated by that of Mr. Valldejule, that the recorder was on top of the credenza during the September 25 meeting. As officers of Local 24, they have a self-interest in testifying as they did; but they did not appear to be dissembling about the matter. The fact that other participants at the September 25 meeting did not notice the recorder is not unusual. The credenza had a number of items on it. The recorder was small and encased in a black covering that would not have called attention to it, especially since it was next to a yellow legal pad. The eyes of anyone glancing in the direction of the recorder would have been drawn to the large yellow pad, rather than to the inconspicuous recorder, which made no noticeable noise.

14. After the September 25 meeting, Ms. Morales told Ms. Fuentes that she had taped the meeting and offered the tape to Ms. Fuentes for assistance in typing up her notes.[7]

15. Ms. Fuentes immediately reported to Mr. Arlook that the meeting had been taped. Mr. Arlook was "very surprised and very angry" to learn this. (TR 36). He "stewed a bit" about the matter and then called his supervisors in Washington to report the incident. (TR 57).

16. On September 30, Mr. Arlook walked to Ms. Morales's office, closed the door, and "confronted" her on the matter. (TR 58). He testified that Ms. Morales "admitted" she had taped the entire session and claimed the recorder was "in full view" on the credenza. (TR 58). He testified that after he told her that neither he nor Ms. Fuentes had seen the recorder, she made light of the matter by saying maybe the tape did not come out. He testified that after he reminded her that she was experienced at tape recording training sessions and conferences, she changed the tack of the conversation, by saying that it was not even a bargaining session. He testified that he refuted this tack by, _inter alia_., reminding her that she requested the meeting as President of Local 24 to discuss office policies and then went on to say:

> Look, Awilda, without regard to technicalities, without regard to legalities, it's just not a very nice thing to do, to surreptitiously tape record somebody's conversation. You had an obligation at a minimum to me to let me know that you had intended to tape that conversation and to see if I would be willing to agree to that procedure.

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[7] Ms. Morales recalls offering the tape to Ms. Fuentes, probably the day after the meeting, when she was delivering some reports to Ms. Fuentes, and found Ms. Fuentes typing up the notes which Ms. Fuentes had taken at the meeting. See TR 126-127, 151-153.

Ms. Fuentes recalls Ms. Morales telling her, on September 26, that she, Mr. Morales, had taped the meeting and did not care what Ms. Fuentes was typing in her notes, but not offering her the tape until a later time, probably the last day of September. See TR 34-37.

Ms. Fuentes seemed to be much surer of her facts than Ms. Morales and is a less-interested witness. Accordingly, I credit Ms. Fuentes' testimony that Ms. Morales offered her the tape at a date later than September 26. The offer most likely occurred after Ms. Morales was confronted by Mr. Arlook, on September 30, and learned how upset he was about the taping. See finding 16, _infra_.

(TR 60) He received no further response from Ms. Morales. He testified that he was "very disappointed and very surprised that [she] would do such a thing" and then left the room. (TR 60). This portion of his testimony was basically corroborated or not refuted by Ms. Morales (see TR 127-128) and is credited.

17. Mr. Arlook also denied that, during this September 30 confrontation with Ms. Morales, she ever "apologized" to him (TR 69) or gave any assurances that the situation would not occur again. Ms. Morales testified that he repeatedly stated that what she did was a violation of the law and that, each time he said this, she said "I'm sorry." (TR 129). She also recalls telling him that it would not happen again.

18. The demeanor of Ms. Morales and Mr. Arlook as witnesses indicated that both were sincere and honest in stating their recollection of the September 30 encounter. Mr. Arlook, from his own testimony and that of Ms. Fuentes, his officer manager, was angry and upset about the matter. He characterized the September 30 meeting with Ms. Morales as one where he "confronted" her. (TR 58). He is the head of the office in which Ms. Morales is employed. He was accusing her of acting illegally. Under these circumstances, it is more than likely that Ms. Morales would say she was sorry and tell him the situation would not occur again. In view of his being so angry and upset, he may well have not heard all her responses. Accordingly, I credit the testimony of Ms. Morales, that she did tell Mr. Arlook she was sorry, at the September 30 meeting, and that she also told him the situation would not occur again.

19. On October 1, Ms. Morales wrote a memorandum to Mr. Arlook and deposited it in a box on his secretary's desk, at 5:00 p.m., after normal working hours. The memorandum is from Ms. Morales, as President of Local 24. The subject is "Taping of Meeting." (GC 4). The entire substance is as follows:

> Regarding the meeting held last Thursday with you, to discuss the docking of time to personnel for arriving after 8:30 a.m., I wish to inform you that I taped the meeting without any intention of bothering you or with the intent of hiding the matter. I entered your office with the tape recorder in my hands, deposited it on top of the table next to the picture you have there, and upon your beginning to talk, I put the tape recorder to work. I presumed that you saw the tape recorder as it is of a size that is noticeable, and as you made no comment at that time, I saw nothing wrong in using it.

> As stated, I had no intention of hiding the fact that I taped the conversation, and even offered the tape to the Office Manager in order for her to make adequate notes of the meeting, as she informed me that she was going to prepare the Mintues.
>
> As I expressed to you yesterday, when you informed me how upset you were about the situation, this will not occur again.

Ms. Morales wrote the memorandum after consulting with the National Union, which wanted her to make a "stronger apology to Mr. Arlook." (TR 159).

20. On October 20, Ms. Morales received a call from the National Union, which was participating in negotiation sessions in Washington. The call was from the Grievance Chairman. He stated to her that the tape matter came up while they were bargaining about other things, and that management was suggesting some agreement in order to avoid Mr. Arlook filing a charge. The proposed agreement was that Local 24 withdraw the appeal to the dismissal of the unfair labor charge (see finding 4, above); that Ms. Morales give "a more strong apology" to the Regional Director about the matter of the tape; and that Ms. Morales permit the removal of a bulletin board. (TR 131).

21. Following the call from the National Union, Ms. Morales met with the members of Local 24, showed them a copy of her October 1 memorandum to Mr. Arlook, explained what the Grievance Chairman had told her, and sought their opinion about what to do. It was their opinion, as to making a stronger apology, that she had "already apologized what else do they want." (TR 133).

22. Mr. Arlook signed and mailed the Charge which initiated this proceeding on January 7. On January 8, he received a telephone call from a reporter on a local newspaper, the Caribbean Business. On January 14, 1981, this newspaper published an article headlined "NLRB director agrees to quit 'harassing' agency union." (R 1). The article refers to the Charge filed by Local 24 with this Authority and to the agreement reached between Region 24 and the General Counsel and which Local 24 had unsuccessfully appealed. See finding 4, above. The article refers to "strained relations" between Region 24 and Local 24 and to Ms. Morales' comment that more charges were to come and were under consideration at the national union level. Since this article, and the January 8 call from the reporter, followed the date on which the Regional Director signed and mailed the Charge, there is no basis for finding that article or the call motiviated the initiation of the Charge.

23. While no bargaining sessions have been cancelled, or not scheduled by management as a result of the September 25 taping by Ms. Morales, the taping has made Mr. Arlook "more alert," in bargaining sessions (TR 72, 93) and he does not feel "as comfortable with the union in bargaining as [he] did before." (TR 93).

Positions of the Parties

Counsel for Respondent refers to the September 25 meeting as a "bargaining session" (TR 202) and concedes that the taping was done, with no notice to management, that "probably the recorder was not noticed by the management representatives at the taped meeting" (TR 204), and that "taping of labor-management bargaining sessions is not a healthy event for constructive labor relations, that this was an unfortunate event." (TR 202). However, no concession was made that an unfair labor practice occurred. It is argued that the taping was "an innocent and simple mistake" for which the President of Local 24 "apologized . . . and said that it would not happen again." (TR 202). Counsel for Respondent stated: "It shouldn't have happened, it won't happen again." (TR 202). He argues that there is no evidence that the taping was done secretively and, indeed, points the other way, because it is uncontroverted that Ms. Morales, herself, volunteered the information that the taping had occurred, shortly after the event. He notes that there is no evidence that constructive labor relations did not proceed, as usual, after the taping was discovered, and during the "some three months before the agency saw fit to file charges." (TR 206). Counsel for Respondent asks for a decision "saying it is not the purpose of the FLRA to sit and take one day's testimony and subject the parties to the expense as well as a defense when the matter is moot . . . . [and a] de minimis violation if any violation at all... . (TR 208-209). He expressed the belief that the Charge was filed in retaliation for the Union's having earlier filed a charge that resulted in a notice being posted: "They [Region 24] said you made us post a notice, now we will make you post a Notice." (TR 209).

The General Counsel does not allege or argue that the taping was done "surreptitiously." (TR 205). It is argued that taping of a bargaining session over work-related problems, by one party, without notice to the other, "inhibit[s] and unduly impede[s] full and frank discussion" and "is in derogation of the obligation to bargain in good faith and as such constitutes a violation of 7116(b)(5) of the Statute." (GC Br 7). The General Counsel asks for a cease-and-desist order and the posting of an appropriate notice to all employees, with the posting limited to Region 24. The General Counsel argues that Ms. Morales' memorandum to Mr. Arlook of October 1 was written, under duress, from Mr. Arlook and her own Union, misstates the facts, fails to constitute an admission of any wrongdoing, actually worsened conditions between the parties, and cannot be relied upon as a promise that the situation will not occur again. The General Counsel also argues that the motivation of the Charging Party, in filing the Charge, is irrelevant.

The Charging Party takes basically the same position as the General Counsel, except for its argument that the preponderance of the evidence demonstrates that the recording was done secretly. (See CP Br 6, 9). The Charging Party also stresses inconsistencies in the testimony of Ms. Morales; why her memorandum to Mr. Arlook, telling him that the situation at issue will not occur again, is regarded as unreliable; and what "an anathema to the good faith requirement of collective bargaining" is the taping which is at issue here. (CP Br 11).

Discussion and Conclusions

Under the Federal Service Labor-Management Relations Statute, "collective bargaining" is defined as a "mutal obligation . . . to meet at reasonable times and to consult and bargain in a good faith effort to reach agreement with respect to the conditions of employment affecting such employees... ." Section 7103(a)(12).

The September 25 meeting here at issue was a "bargaining session" (TR 202), the taping of which without notice to or of the Charging Party, cannot be viewed as "good faith" bargaining by Respondent. The meeting was called by the President of Local 24 to clarify and discuss a rule about docking time for personnel arriving after the start of the working day. Labor relations between the parties were already strained -- because of the unfair labor practice charge which Respondent had lodged against the Charging Party here, and because of the Charging Party's recent refusal to share the minutes taken at a recent bargaining session with Respondent. It was under these circumstances that the September 25 meeting began, with a tape recorder quieting recording the meeting, activated by Respondent's President and unobserved by and without notice to the Charging Party.

Counsel for Respondent is an attorney with another regional office of the National Labor Relations Board. With commendable candor, he expressed what appears to be the view of the National Union, that this was an "unfortunate event" and not a "healthy [one] for constructive labor relations." (TR 202). While he declined to concede that the event constituted an "unfair labor practice" (TR 206), the circumstances indicate that it must be so considered.

Labor-management negotiations must be conducted in an atmosphere that encourages free and open discussion. The recording of bargaining sessions, by tape recorder or by a court reporter or stenographer, has a tendency to inhibit the parties and "may cause them to talk for the record rather than advance toward an agreement" and lead to "posturing for the record instead of the spontaneous, frank, no-holds-barred interchange of ideas and persuasive forces that successful bargaining often requires." See NLRB v. Bartlett-Collins Co., 639 F.2d 652, 656, 657 (C.A. 10, 1981), enforcing an order of the National Labor Relations Board, in 237 NLRB 770, 99 LRRM 1034, (1978), which had held that the employer bargained in bad faith by insisting, to impasse, on the presence of a stenographer as a precondition to bargaining.[8/]

When the recording is done by one party, without notice to, or observation by the other party, good faith bargaining fails. Such a ploy allows the knowledgeable party to be circumspect in what is said, and how it is said. The unsuspecting party is not so on guard, and is at the mercy of the recording device.

Where the recording of a bargaining session has been surreptitiously done, the National Labor Relations Board has refused to admit the tape as evidence in a refusal-to-bargain proceeding, on the ground that such recording would inhibit severely the willingness of parties to express themselves freely, and seriously impair the collective bargaining process. See Maywood Do-Nut Co., 248 NLRB No. 80, 104 LRRM 1095 (1980) and Carpenter Sprinkler Corp., 238 NLRB No. 139, 99 LRRM 1356 (1978). That rationale is applicable to the situation here as well, even though I have found that the recording was not done surreptitiously.

A serious breach of good faith bargaining occurred here; and it was not reduced to a *de minimis* one by the subsequent confession and expression of remorse, and the fact that bargaining has continued between the parties.

Nor does the record support the argument made by Respondent that this entire proceeding is a sham and retaliatory, to get even with Local 24 for using the offices of this Authority. See TR 20-21, 208-211 and GC 1(e). The record indicates that Mr. Arlook was very upset by the event at issue; and his delay in filing the charge was occasioned by the fact that his superiors, in Washington, were attempting to resolve the matter during ongoing negotiations with the National Union.

[8/] The Bartlett-Collins rationale has been followed in Latrobe Steel Company, 244 NLRB No. 59, enforced, on this issue, 630 F.2d 171, 105 LRRM 2393 (C.A. 3, 1980). Both Bartlett and Latrobe are pending, on appeal, to the United States Supreme Court.

The Respondent's argument, that the matter is moot and has been adequately remedied by Respondent itself, is rejected. While I have found that Respondent's President did not actively seek to conceal the taping of the session, neither did she or Respondent's Vice President call attention to it or give prior notice of it. Placing an inconspicuous recorder on top of a piece of furniture, cluttered with other items that could easily obscure its view, suggests that the Respondent's officials participating in the meeting realized that it might be unobserved. The memorandum of Respondent's President, stating a "presum[ption]" that it had been seen by Mr. Arlook is post-event wishful thinking, arrived at after she realized she was in trouble with both Mr. Arlook and the National Union over the matter. The *mea culpa* expressed over the matter seems to flow more from the National Union than local union officials. Although the taping came to light through the offices of Local 24, and has apparently not recurred, it has chilled relations even further between the parties. The Charging Party is entitled to an FLRA-imposed remedy to assure that the event will not be repeated.

Ultimate Findings and Order

Respondent has engaged in an unfair labor practice, under Section 7116(a)(5) of the Statute.

Pursuant to Section 7118(a)(7) of the Statute, 5 U.S.C. § 7118(a)(7) and Section 2423.29(b) of the Rules and Regulations of the Authority, 5 CFR § 2423.29(b), the Authority hereby orders that Respondent shall:

1. Cease and desist from:

(a) Mechanically recording any future bargaining sessions with representatives of the National Labor Relations Board, Region 24, without prior notice to Region 24.

(b) In any like or related manner, failing to bargain in good faith with Region 24.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute.

(a) Inform the National Labor Relations Board, Region 24, of any intent to mechanically record any bargaining sessions.

(b) Post at the facilities of Region 24, copies of the attached Notice, marked as Appendix A, on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the President of Respondent and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

Isabelle R. Cappello
ISABELLE R. CAPPELLO
Administrative Law Judge

Dated: September 29, 1981
Washington, D.C.

[2-CO-50]

APPENDIX A

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT mechanically record any bargaining sessions with representatives of the National Labor Relations Board, Region 24, without prior notice to Region 24.

WE WILL NOT, in any like or related manner, fail to bargain in good faith with the National Labor Relations Board, Region 24.

WE WILL inform the National Labor Relations Board, Region 24, of any intent to mechanically record any bargaining session.

____
(Agency or Activity)

Dated: ____________________ BY: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If Employees have any questions concerning this Notice, or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region II, address is: Room 241, 26 Federal Plaza, New York, New York 10278 and whose telephone number is (212) 264-4934.

[3-CA-2379]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

MARINE CORPS DEVELOPMENT
AND EDUCATION COMMAND

(Respondent)

and

Case No. 3-CA-2379

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1786, AFL-CIO

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on October 6, 1981, finding that the Respondent had engaged in the alleged unfair labor practices and recommending that the Respondent cease and desist therefrom and take certain affirmative actions.

No exceptions to the decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's rules and regulations, as amended (45 Fed. Reg. 40674 (1981)), the findings, conclusions and recommendations in the decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., January 29, 1982

James J. Shepard

James J. Shepard, Executive Director

[3-CA-2379]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
SUITE 416 - 1111 20TH STREET, N.W.
WASHINGTON, D.C. 20036

. . . .

MARINE CORPS DEVELOPMENT AND
EDUCATION COMMAND

Respondent

and

Case No.: 3-CA-2379

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1786, AFL-CIO

Charging Party

. . . .

Mitchell Arkin, Esquire
For the Respondent

Erick Genser, Esquire
Louise Richter, Esquire
For the General Counsel

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code., 5 U.S.C. Section 7101 et seq., and the Rules and Regulations issued thereunder, Fed. Reg., Vol. 45, No. 12, January 17, 1980, 5 C.F.R. Chapter XIV, Part 2411, et seq.

Pursuant to amended charges first filed on May 5, 1981, by the American Federation of Government Employees, Local 1786, AFL-CIO, (hereinafter called the Union or AFGE), a Complaint and Notice of Hearing was issued on July 6, 1981, by the Regional Director for Region III, Federal Labor Relations Authority, Washington, D.C. The Complaint alleges, in substance, that the Marine Corps Development and Education Command, (hereinafter called the Respondent or Marine Corps.), violated Sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by virtue of its action in unilaterally terminating the "self help lot" in the laundry without affording the Union adequate prior notice of its decision and the opportunity to negotiate and/or bargain concerning "the substance, impact and implementation of the termination".

A hearing was held in the captioned matter on August 3, 1981, in Washington, D.C. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The parties submitted post hearing briefs on September 11, 1981, which have been duly considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The Union, the charging party herein, is the exclusive representative of a unit of non-supervisory employees working in Respondent's Marine Corps and Development and Education Command located at the Marine Corps Base in Quantico, Virginia. Included in the bargaining unit are some 23 employees assigned to the Laundry and Dry Cleaning Plant.

The management or supervisory hierarchy at the laundry and dry cleaning plant, in ascending order, is as follows: (1) First line supervisor or Plant Foreman, (2) Laundry Chief, (3) Laundry Manager, (4) Assistant Chief of Staff For Supply.

Mr. Charles Bowling, a civilian, has held the position of Plant Foreman since 1975. Currently, Master Sergeant Probasco holds the position of Laundry Chief. Master Sergeant Charles Graves, who is now a civilian, held the position until November 1980. The position of Laundry Manager is currently held by a Mr. Matthews who is a civilian. Prior to Mr. Matthews, the position was held at various times by Warrant Officers Simpson and Tyler. Above the Laundry Manager is the Assistant Chief of Supply, who is Colonel Byron Madden. Colonel Madden was assigned the position in August 1979. Prior thereto the position was held by Colonel Berthoud.

According to the credited testimony of Ms. Edyth McLaurine, who has worked in the Laundry and Dry Cleaning Plant since 1965 and has been the Union Steward for the past seven years, the employees have since about 1975 sent their own personal clothing through the laundry at no charge to themselves. Thus, according to Ms. McLaurine, the clothes are sent in with that of the paying customers and are cleaned and pressed as time permits. The employees clothes sent through the laundry in this manner are referred to as the "self help lot". In fact according to Ms. McLaurine, whose testimony in this latter respect is supported by Mr. Bowling, Plant Foreman, the "self help lot" was not processed surreptitiously but rather out in the open with appropriate notations being made on the production records submitted to the Laundry Chief's office. Further, according to Ms. McLaurine, at various times the Laundry Chief and the Laundry Manager utilized the "self help lot" to have their respective clothes cleaned.

In 1977, the laundry employees were told to discontinue the "self help lot". Thereafter, upon the filing of a grievance with Colonel Berthoud, Assistant Chief of Staff for Supply, Ms. McLaurine was informed by Chief Warrant Officer Simpson, who was then the Laundry Manager, that the Colonel had o'kayed the resumption of the "self help lot" with a few guidelines. Later Mr. Bowling, who was then Laundry Foreman, informed the employees that the practice was reinstated. Mr. Bowling supports Ms. McLaurine's testimony in the aforementioned respect and attributes the order to reinstate the "self help lot" to Master Sergeant Graves who was then Laundry Chief.[1] According to Graves, he was not given any specific instructions from CWO Simpson with respect to reinstituting the "self help lot". Mr. Graves did testify, however, that the "self help lot" was stopped once before by a Colonel Cangers. Subsequently, he was told by the Laundry Officer that Marine Headquarters had left it up to the Command and that the "self help lot" could continue as long as it did not interfere with the regular work load. Mr. Graves acknowledges using the laundry facilities for his own laundry.

According to Mr. Dale Schafer, who has been president of the Union since 1977, the Union filed an unfair labor practice in 1977 when Colonel Berthoud did away with the "self help lot". Subsequently, the matter was apparently settled upon the promise from either Colonel Berthoud or the

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[1] According to Mr. Bowling, he had been told in the past by Chief Warrant Officer Tyler, who was then a Laundry Manager, to allow the employees to do their own personal laundry.

Assistant Chief of Staff that a check would be made with Marine Corps Headquarters concerning the propriety of the "self help lot". Thereafter, some two weeks later, without any formal notice from the Respondent to the Union, Ms. McLaurine, who was then a union steward, informed Mr. Schafer that the "self help lot" had been reinstated.[2]

In any event, the record indicates that the "self help lot" was reinstated in 1977 and continued until 1981, when the events underlying the instant complaint occurred. Thus, according to the testimony of Colonel Madden, who had succeeded Colonel Berthoud in August of 1979, upon being informed of the existence of the "self help lot", he ordered that the practice be terminated immediately. When he was subsequently advised by his staff that he should have first consulted with the Union before curtailing the practice, Colonel Madden wrote to Union President Schafer on February 25th for purposes of discussing the termination of the "self help lot".[3] Not hearing from the Union President, who was then on leave, Colonel Madden on March 3, 1981 without any further consultation or notice to the Union, went to the Laundry Plant and informed the laundry steward, the laundry foreman and the laundry chief to instruct the employees that the "self help lot" practice was illegal and that it was to be terminated that day, March 3, 1981.

By letter dated March 4, 1981, Colonel Madden informed Union President Schafer that the "self help lot" was terminated.

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[2] Mr. Walter Cooper, an official with the U.S. Marine Corps Headquarters, testified that he had a conversation with Colonel Berthoud in 1977, wherein he informed the Colonel that the "self help lot", was contrary to the Marine Corps Laundry and Dry Cleaning Manual and should be stopped. (Neither a copy of the manual nor any excerpts therefrom, were included in the record.)

Mr. Marvin Twiford, who served as a technical supervisor and representative to Colonel Berthoud during the 1977 incident concerning the cessation of the "self help lot", testified that Colonel Berthoud had indicated to him that under no circumstances would he allow the "self help lot to continue, if, as they agreed, the practice was a violation of the Marine Corps Regulations. Mr. Twiford acknowledged that he did not know whether or not the Colonel might have communicated something different to the Union.

[3] Although the circumstances are not clear, the record indicates that the "self help lot" was reinstated.

Discussion and Conclusions

The General Counsel, relying primarily upon the Authority's decision in Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 5 FLRA No. 48, takes the position that the Respondent violated Sections 7116(a)(1) and (5) of the Statute when it unilaterally discontinued an established practice, i.e. "self help lot", without prior notice and bargaining with the Union concerning both the substance and impact of its decision.

Respondent, on the other hand, takes the position that while the employees might have had their personal laundry and dry cleaning done at the plant, such activity did not "constitute an established past practice" since it was not accomplished with both the knowledge and permission of responsible management. Respondent further contends that even assuming that a valid past practice is found, a status quo ante remedy is not in order since such a remedy would be in violation of the Marine Corps Laundry Manual and 5 CFR 735.205 which prohibits the use of government property by employees "for other than officially approved activities".

A reading of the record as well as briefs of the parties makes it clear that resolution of the allegations of the instant complaint turns on the nature of the "self help lot". In this connection, I find, contrary to the contention of the Respondent, that the "self help lot" was indeed a management known established past practice which was in effect prior to Colonel Madden's order to discontinue same on March 3, 1981. In reaching this conclusion I rely upon the credited testimony of Ms. McLaurine, Mr. Bowling and Mr. Schafer concerning (1) both the discontinuance and reinstitution of the "self help lot" in 1977, when the Laundry Plant was then under the ultimate supervision of Colonel Berthoud, (2) the utilization of daily production records indicating that the employees were using the "self help lot" and (3) the fact that various supervisors, including Colonel Berthoud and Warrant Officer Tyler had, on occasion, themselves utilized the "self help lot".

Inasmuch as the "self help lot" was an established practice known and, at least, implicitly condoned by management officials, Respondent was under an obligation to give the Union notice and an opportunity to bargain over its decision to terminate the practice. U.S. Department of the Treasury, Internal Revenue Service, New Orleans District, New Orleans, Louisiana, A/SLMR No. 1034; Internal Revenue Service, Southwestern Region, New Orleans, A/SLMR No. 1153; Department of the Navy, Naval Underwater Systems Center, Newport Naval Base, 3 FLRA No. 64.

Having failed to give the Union reasonable advanced notice of its decision to terminate the "self help lot" and allow the Union the opportunity to request bargaining over the decision, Respondent violated Sections 7116(a)(1)(a), (5) of the Statute.

Moreover, even assuming the validity of Respondent's contention that the "self help lot" was illegal since it was allegedly violative of both the Marine Corps Laundry Manual and 5 CFR 735.205 which prohibits use of government property without permission, I find such illegality to be an insufficient defense for Respondent's unilateral discontinuance of the "self help lot" past practice. Thus, as noted by the Authority in Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, supra, while the illegality certainly must be remedied in any final solution, it is not of itself a valid defense to the actions of a Respondent in unilaterally altering or discontinuing an existing past practice.

Having found and concluded that the Respondent violated Sections 7116(a)(1) and (5) of the Statute by virtue of its action in unilaterally terminating the "self help lot" without first giving the Union notice and allowing the Union the opportunity to request bargaining over the substance and impact of such decision, I recommend that the Authority issue the following order designed to effectuate the purposes of the Statute.

ORDER

Pursuant to Section 7118(a)(7)(A) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. Section 7118(a)(7)(A), and Section 2423.29(b)(1) of the Rules and Regulations, 5 C.F.R. Section 2423.29(b)(1), the Authority hereby orders that the Marine Corps Development and Education Command, Quantico, Virginia shall:

1. Cease and desist from:

(a) Discontinuing the "self help lot" without first notifying the American Federation of Government Employees, Local 1786, AFL-CIO, the exclusive representative of its employees, and affording such representative the opportunity to negotiate in good faith, to the extent consonant with law, regulations and Statute, with regard to such proposed discontinuance.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute

(a) Reinstitute the "self help lot".

(b) Notify the American Federation of Government Employees, Local 1786, AFL-CIO, the exclusive representative of its employees, of any proposed discontinuance of the "self help lot" and, upon request, negotiate in good faith, to the extent consonant with law, regulations and the Statute, on such intended discontinuance.

(c) Post at its facilities at the Quantico Marine Corps, Quantico, Virginia, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Assistant Chief of Supply and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to Section 2423.30 of the Authority's rules and regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Burton S. Sternburg

BURTON S. STERNBURG
Administrative Law Judge

Dated: October 6, 1981
Washington, D.C.

[3-CA-2379]

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL not discontinue the "self help lot" without first notifying the American Federation of Government Employees, Local 1786, AFL-CIO, the exclusive representative of our employees, and affording such representative the opportunity to negotiate in good faith, to the extent consonant with law, regulations and Statute, with regard to such discontinuance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL reinstitute the "selp help lot".

WE WILL notify the American Federation of Government Employees, Local 1786, AFL-CIO, the exclusive representative of our employees, of any proposed discontinuance of the "self help lot" and, upon request, negotiate in good faith, to the extent consonant with law, regulations and the Statute, on such intended discontinuance.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice, or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region 3, whose address is: Suite 300, 1133 15th Street, N.W., Washington, D.C., 20005, and whose telephone number is: (202) 653-8452.

97. #6

Federal Labor Relations Authority

Washington, D.C. 20424

Number 6

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

March 19, 1982

UNFAIR LABOR PRACTICE CASES

5-CA-869 (March 19, 1982)

United States Air Force, 2750th Air Force Base Wing Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio and American Federation of Government Employees, Local 1138, AFL-CIO

6-CA-675 (March 19, 1982)

Department of the Treasury, Bureau of Government Financial Operations, Austin Disbursing Center and National Treasury Employees Union, Chapter 214

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* THIS REPORT SERIES INCLUDES DECISIONS AND ORDERS OF FLRA ADMINSITRATIVE LAW JUDGES TO WHICH NO EXCEPTIONS WERE FILED WITH THE AUTHORITY WITHIN THE PRESCRIBED TIME LIMIT. IN ACCORDANCE WITH SECTION 2423.29(•) OF THE AUTHORITY'S RULES AND REGULATIONS, AS AMENDED (46 FED. REG. 40674 (1981)), THE FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS IN SUCH ALJ DECISIONS CONSTITUTE, WITHOUT PRECEDENTIAL SIGNIFICANCE, FINDINGS, CONCLUSIONS, DECISIONS AND ORDERS OF THE AUTHORITY.

Y 3. F 31/21-3:

[5-CA-869]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES AIR FORCE,
2750th AIR FORCE BASE WING HEADQUARTERS,
AIR FORCE LOGISTICS COMMAND,
WRIGHT-PATTERSON AIR FORCE BASE, OHIO

(Respondent)

and

Case No. 5-CA-869

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1138, AFL-CIO

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on January 21, 1982, finding that the Respondent had not engaged in any unfair labor practice as alleged in the complaint, and recommending that the complaint be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (46 Fed. Reg. 40674 (1981)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusion, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., March 19, 1982.

James J. Shepard

James J. Shepard, Executive Director

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

UNITED STATES AIR FORCE,
2750th AIR FORCE BASE WING HEADQUARTERS,
AIR FORCE LOGISTICS COMMAND,
WRIGHT-PATTERSON AIR FORCE BASE, OHIO

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1138, AFL-CIO

Charging Party

Case No. 5-CA-869

Fred Hustad, Esq.
For Respondent

Betty Jean Carroll
For the Charging Party

Arlander Keys, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, *et seq*.

Upon an unfair labor practice charge filed by the American Federation of Government Employees, Local 1138, AFL-CIO (herein referred to as the Union) on December 22, 1980 against the Air Force Logistics Command and the 2750th Air Base Wing, Wright-Patterson Air Force Base, Ohio (herein referred to as Respondent), the General Counsel of the Authority, by the Regional Director for Region 5, issued a Complaint and Notice of Hearing on July 24, 1981 alleging that on or about December 11, 1980, Respondent violated section 7116(a)(1) and (8) of the Statute by failing and/or refusing, upon request, to afford union representation to employee Alice B. Spearman at an examination in connection with an investigation when she reasonably believed that disciplinary action might be taken against her as a result of the examination. The Complaint was amended at the hearing, over Respondent's objection, to include an examination of December 15 as well.

A hearing on the Complaint was conducted on October 8, 1981 in Dayton, Ohio at which time all parties were represented and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses, and argue orally. Briefs were filed by Respondent and Counsel for the General Counsel.

Upon the entire record in this matter, my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following findings of fact, conclusions of law, and recommendation:

Chronology of Events

At all times material the Union has been the exclusive collective bargaining representative of various General Schedule employees at Respondent's Wright-Patterson Air Force Base facility.

In September 1980 James W. Robards, Special Agent with the Air Force Office of Special Investigations (OSI) began an investigation of an allegation that Alice B. Spearman was diverting U.S. Government property for her personal use. Ms. Spearman was the Supply Officer for the Air Force Museum at the facility. The investigation revealed that during the September - October 1980 period the Museum had ordered numerous rolls of Polaroid photographic film and an AM-FM radio, neither of which the Museum utilized in the performance of its mission. In addition, the Museum had ordered a portable circular saw which was not required since the Museum already possessed one. It also came to Agent Robards' attention that on the morning of November 17, 1980 Ms. Spearman claimed to be on official business at Base Supply when in fact she had been to a hearing in connection with her filing for bankruptcy. The investigation further disclosed that Ms. Spearman had submitted a claim for reimbursement of travel expense from the Museum to Base Supply for November 17.

On December 11, 1980 Agent Robards telephoned Ms. Spearman, identified himself as being with OSI, and notified her that he wanted her to come to his office to discuss "something". Spearman suspected that the matter had to do with the disappearance of a radio from the Supply Office on November 19.[1] Spearman left her office to meet with Robards without notifying her immediate supervisor, Joan Sharp, who worked in another building. Spearman testified that while driving to the OSI office she remembered she had not informed her supervisor of her whereabouts so stopped her car and placed a telephone call to Sharp and notified her of the situation.[2] Regarding this alleged telephone call to Sharp, Spearman testified as follows:

> "A. ...I told her that I had just gotten a call from the OSI office and I was on my way up there. But I asked her, you know, should I or could I take somebody with me like a Union man ... And she said 'well, no, the Union has nothing to do with the OSI. And whenever they call you have to go straight up there and if you don't they can come and arrest you ...'
>
> "Q. Did Mrs. Sharp say what would happen if you did take a Union person with you?
>
> "A. Well she said even if you take anybody with you, she said whenever they question -- an OSI person is questioning you, you have to go in there by yourself and if they go with you they will not let them in. They have to wait outside."

Ms. Sharp denied that any such conversation ever occurred.

Ms. Spearman met with Agent Robards at the OSI office on December 11, 1980 and again on December 15 and 16.[3] In Robards' judgment, prior to the meetings the evidence against Spearman was insufficient to bring an "action" against her. However, during the December 11 and 15 interviews Spearman admitted in sworn statements to ordering Polaroid film on serveral occasions, and from June 1980 to November 1980 having sold 35 to 40 rolls of Polaroid film for $5.00 per roll and having given away approximately five rolls of Polariod film while keeping about 10 rolls for herself. Spearman also admitted to having ordered Kodak 110 film and keeping 15 to 20 rolls of this film for her personal use; having sold approximately 30 flash bars for $1.00 each while keeping four or five for herself; and having given a few rolls of Kodak 110 film, on a few occasions, to museum employees whom she did not wish to identify. In addition, in her December 11 sworn statement Spearman admitted to ordering, in September 1980, one AM/FM Panasonic radio as a Christmas present for her daughter. Spearman also admitted to having submitted a request for reimbursement for travel on official business on November 17, 1980 which never occurred[4] and in having provided, from Government supplies, a circular power saw and various hand tools to an individual employed by Respondent at the facility but not working at the Museum.

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[1] On November 18, 1980 a radio Spearman previously ordered was delivered to the Museum Supply Office and on November 19 the radio and related documents were missing from the Supply Office. Unknow to Spearman, Robards surreptitously impounded the missing items while conducting his investigation of her.

[2] The OSI office was located approximately five to six miles from Spearman's workplace.

[3] The information Spearman volunteered at the December 16 meeting dealt with the activities of other employees and not with her own conduct.

According to Ms. Spearman, in a conversation on December 16 with Ms. Sharp regarding Spearman's inquiry as to whether it might help her cause if she talked to the Museum Director about the investigation, Spearman was advised by Sharp that she could have a union representative with her. Spearman contends she commented that she thought she couldn't have a union representative with her and alleges Sharp replied she could when she met with the Director.

Thereupon, according to Spearman, she contacted Union Steward Wendall Ledbetter and told him she had been charged with "certain things" and signed statements after being questioned by OSI. When asked by Ledbetter why she didn't ask for representation Spearman told him she had asked her supervisor, Ms. Sharp, who told her she couldn't have union representation since the matter involved the OSI.[5] The unfair labor practice charge on the matter was then filed on December 22, 1980.

Ms. Sharp admits to having a conversation with Ms. Spearman concerning the possibility of having a meeting with the Director about the matter. However, in her version, which varies substantially from Spearman's, Sharp testified that she talked with Spearman about the investigation on Friday, December 12 and at that time Spearman expressed concern over whether the Director would let her keep her job. Sharp was noncommittal and suggested Spearman think about it over the week-end. According to Sharp, Spearman called back on Monday, December 15 and after Spearman told her she hadn't made up her mind about meeting with the Director, Sharp asked Spearman if she had talked to anyone else abut the matter. Spearman said "no, other than at home a little bit. But nobody at the Museum". Sharp asked if Spearman knew she could have a union representative and could contact Union Steward Wendall Ledbetter. Spearman purportedly replied, "Well, maybe I'll do that then."

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[4] A check for $4.72 relative to this claim was received by Spearman in her December 11 mail delivery and was turned over to Robards on December 15.

[5] Ledbetter corroborates this conversation with Spearman.

By letter dated January 16, 1981 Respondent served notice on Ms. Spearman that it was proposing to remove her from her position with the Air Force for theft of Government property, falsification of an official document and accepting reimbursement for expenditures for travel not performed, and unauthorized disposition of Government property. On February 20, 1981 Spearman was removed from employment with the Air Force.

Discussion

Section 7114(a)(2)(B) of the Statute provides:

> "An exclusive representative of an appropriate unit shall be given the opportunity to be represented at ... any examination of any employee in the unit by a representative of the agency in connection with an investigation if (i) the employee reasonably believes the examination may result in disciplinary action against the employee; and (ii) the employee requests representation."

I conclude that the examinations of Ms. Spearman by OSI Agent Robards on December 11 and 15, 1980 were examinations within the meaning of section 7114(a)(2)(B)(i) of the Statute. It is beyond question that Robards was an agent of Respondent in conducting the investigation in which Spearman was a suspect due to her position as Museum Supply Officer[6/] and that Spearman reasonably believed that the examination could have resulted in disciplinary action against her. Indeed, Robards testified that the examinations opened with him advising Spearman she was suspected of being involved in the diversion of U.S. Government property, i.e. camera film, and falsification of an employee time card.

The question left for consideration herein is whether Ms. Spearman requested union representation. Her testimony, supra, is that she brought up the subject with her supervisor, Joan Sharp, and was told that she was not entitled to union representative in a meeting with OSI. If Spearman's testimony is credited then Sharp's statement is tantamount to a refusal to allow union representation for, in my view, Spearman could have reasonably relied on her supervisor's recitation of her right to union representation. However, Sharp denies that Spearman ever mentioned

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[6/] Lackland Air Force Base Exchange, Lackland Air Force Base, Texas, 5 FLRA No. 60 (1981) and Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Hartford District Office, 4 FLRA No. 37 (1980).

or suggested union representation at any time before she made the admissions in the statement's given to Agent Robards on December 11 and 15, 1980, admissions which, in large measure, formed the basis of the removal action taken against Spearman.

Ms. Spearman's and Ms. Sharp's versions of the conversations concerning union representation in this matter, while sharply divergent, are both plausible. Thus, the conversation could have occurred either the way Spearman testified or the way Sharp testified and either would seem to be a reasonable representation of a factual episode not inherently unbelievable. However, one of the versions obviously is false.

I have examined the entire testimony of Ms. Sharp and find no contradictions or substantial flaws which would cause me to question the credibility of the witness. Such is not the case with regard to testimony of Ms. Spearman. Accordingly, I do not credit the testimony of Spearman relative to her alleged conversation with Sharp on December 11. Rather, I credit the testimony of Sharp that Spearman never made any inquiry or request for union representation prior to her interviews of December 11 and 15. I make this finding based primarily upon an overall evaluation of Spearman's credibility as a witness.

To begin, Ms. Spearman initially testified on cross-examination in this proceeding that she placed a call to Ms. Sharp from a pay phone and, due to a malfunction in the phone, the operator had to intervene to put through the call for her. However, in a sworn statement given to the Federal Labor Relations Authority, Spearman stated she was unable to complete the call on the malfunctioning pay phone and went to a vacant office to complete the call. This latter version is the one adhered to at the hearing.

Next, the sworn statement that Ms. Spearman gave to Agent Robards on December 11, 1980 states, inter alia: "I ordered one AM/FM Panasonic RX5100 radio under document number ... It was ordered as a Christmas present for my daughter." At the hearing Spearman testified that she actually ordered the radio for office use and had so informed Robards but during the interview Robards insisted she ordered the radio for her daughter and she capitulated. Spearman testified that she signed the statement, which was dictated by Robards,[7] even though the portion about ordering the radio for her daughter was untrue, essentially because she was "pressured", thought she had no choice, had been told by Robards that by admitting her conduct it would go easier on her, and was "upset and worn out".[8] On cross-examination Spearman also testified that at the time of the interviews she would have signed anything or testified to anything if it would have helped her.

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[7] Robards interrogated Spearman in the presence of another Special Agent and dictated the statement to a stenographer in Spearman's presence. The statement was then transcribed, typed and initialed and signed by Spearman.

I do not credit Ms. Spearman's stated reasons for recanting her testimony. Doubtless Spearman was nervous and probably somewhat confused during the interview, and tired at its conclusion. However, her testimony relative to this serious matter lacks the ring of truth. Agent Robards denies telling Spearman that by her making admissions the situation would be made easier for her, or words to that effect. Robards' version was corroborated by James Parker, another OSI agent present during the interview.[9] Further, part of the rights read to Spearman at the beginning of the interview by Robards and again expressly provided on the statement she specifically initialed at the time of signing her statement provided that she had "... the right to remain silent, that is, say nothing at all" and if she "... decide(d) to answer questions without a lawyer present ... (she could) ... stop the questioning at any time." A portion of the statement which Spearman specifically initialed also states, in type: "I want to make the following statement voluntarily and of my own free will. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me."

With regard to her initialing various printed matter on the form in which her statement was added, Ms. Spearman gave the following testimony on cross-examination:

> "Q. And are these your initials here at the end of the statement which says, 'I have also read the foregoing language. I completely understand my rights. I do not wish to exercise my right to remain silent. I do not want a lawyer. I want to make the following statement voluntarily and of my own free will. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.' Are those your initials right after that?
>
> "A. Yeah, those are my initials. Like I said, when he told me to initial, I -- he said initial here, here, here. And that's what I did.

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[8] The interview began at approximately 2:45 p.m. and concluded at 5:40 p.m.

[9] Spearman also testified at the hearing that during the December 15 interview Robards also made a similar remark to her. Robards and Agent Keedy, who was present at the December 15 interview, deny any such comment was made. I credit Agent Robards and the corroborative testimony of the other OSI agents in this matter.

"Q. And that was never read to you or explained to you that that's what you were signing? You didn't read that?

"A. No, those -- stopping and reading each one, I don't recall that. But I know when she came back with it typed, he told me to -- he had to have my initials here, here and here, at a lot of places on there. And everywhere he pointed, that's where I signed, I initialled.

"Q. Well weren't you concerned about that you might initial something you shouldn't; or weren't you concerned that you might be making a statement in here with which you didn't agree?

"A. Well, no. I thought everything he had said was right. And I was trying to help out. He said the more I volunteered and told them about, you know, what had happened and what I had done, it would be easier. So when he was having me initial and everything, I thought that's what I was supposed to do. And I'd been there so long and I was mixed up to -- I just went ahead and was signing all those things and I shouldn't."

Moreover, various portions of her December 11 statement contain exculpatory language or protected the identity of those she had given film. Thus, after admitting to submitting a request for reimbursement for official travel not performed, Ms. Spearman's statement explained:

> "I felt that this was justified since I have in the past made trips to Supply and back and did not file for Vicinity Travel. For example, the following day I went to Supply to pick up some calendars using my POV and did not submit a voucher for Vicinity Travel. I did not request or take any sick leave or regular leave for the morning of 17 Nov 80. However, to make up for the time lost to the Government I worked during my lunch hour and worked late that evening."

Ms. Spearman's statement also explained that while she had on "a few occasions" provided "a few rolls" film to other unnamed employees, she "... did not wish to identify them because ... they were unaware that it was a routine ordering item."

Also, with regard to the December 15, 1980 interview by Agent Robards, Ms. Spearman similarly testified at the hearing that she was "upset" and "nervous". Nevertheless, on that occasion when Robards questioned her as to others being involved with her, in her statement she specifically denied forging the signature of another employee and states: "I have not knowingly provided, nor was I requested to provide any U.S. Government items to anyone for their personal use other than those persons identified in my statement to AFOSI on 11 Dec 80."

Thus, it would appear from credited testimony and objective evidence that contrary to her testimony at the hearing, Ms. Spearman was not so "pressured" or "upset and worn out" or without a "choice" when giving her statement on December 11 that she simply told Agent Robards what she thought he wanted to hear, regardless of the truth of the matter. Rather, it appears she was sufficiently composed and had adequate presence of mind to control the information she gave to Robards during her interviews.

Again, regarding Ms. Spearman's December 11 statement concerning the radio, she originally testified on examination by Counsel for the General Counsel that Agent Robards did not show her a copy of any document relating to her ordering the Panasonic RX5100 radio while he was questioning her on this subject. However, later, on cross-examination by counsel for Respondent, Spearman acknowledged that Robards indeed did show her a copy of the requisition form on which she had ordered the radio.

Additionally, Ms. Spearman testified during the hearing that while being interviewed by Agent Robards on December 11 and 15, 1980 she was at all times under the impression that she had no choice but to remain at the interview and sign the statement. I find such a comment to be incredible considering that on both dates Robards read Spearman her "rights" which included the right to stop the questioning at any time,[10] such reading was credibly corroborated by another OSI agent in each instance, and Spearman initialed a document at each interview which stated she could stop the questioning at any time. Spearman is a woman with a high school education, with almost 25 years of service with the Government, who at the time was employed as a GS-6 and holding a job of more than ministerial responsbility. Further, from my observations Spearman is a reasonably intelligent individual. In these circumstances and considering my prior findings regarding her mental state during the interviews in question I do not credit her testimony before me to the effect that she thought she had to remain throughout the interviews with Robards and sign the statements.

Finally, Ms. Spearman testified at the hearing that she was told during her interviews by Agent Robards on December 11 and 15, 1980 that the OSI had written statements concerning her activities from other witnesses. Robards denied having made such a statement and his denials were corroborated by the other OSI agents present during the interviews. I credit Robards denial and corroboration of the other OSI agents.

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[10] This was the last of a series of rights read to the witness by Robards.

Summary

In view of the entire foregoing, including Ms. Spearman's departure in her testimony from her statement to the Authority on the circumstances of making the alleged telephone call to Ms. Sharp; recanting from her sworn statement regarding the ordering of the radio for her daughter and the circumstances thereof; her contradictory testimony regarding being shown a copy of the requisition form on which the radio was ordered when being questioned by the OSI; and my findings regarding her testimony versus corroborated testimony as to being told by Agent Robards that her cooperation in the investigation would make things go easier on her and OSI having written statements of others as well as Spearman's testimony that she was under the impression while being questioned by OSI that she had no choice but to remain at the interview and sign the statements, I find Spearman's testimony to be unreliable when compared with the testimony of Ms. Sharp. Therefore, I do not credit Spearman's version of her conversation with Sharp, supra, regarding having a union representative present while being interviewed by the OSI.

Accordingly, there being no credible evidence that Ms. Spearman requested union representation prior to being interviewed by the OSI on December 11 and 15, 1980 as required by section 7114(a)(2)(B)(ii) of the Statute or was impermissibly dissuaded from seeking union representation, and in view of the entire foregoing, it is recommended that the Federal Labor Relations Authority issue the following Order pursuant to 5 C.F.R. 2423.29 (c):

ORDER

IT IS HEREBY ORDERED that the complaint in Case No. 5-CA-869 be, and hereby is, dismissed.

Salvatore J Arrigo

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: January 21, 1982
Washington, D.C.

[6-CA-675]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE TREASURY,
BUREAU OF GOVERNMENT FINANCIAL OPERATIONS,
AUSTIN DISBURSING CENTER

(Respondent)

and

Case No. 6-CA-675

NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 214

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on January 25, 1982, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative actions.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (46 Fed. Reg. 40674 (1981)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., March 19, 1982

James J. Shepard

James J. Shepard, Executive Director

[6-CA-675]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF THE TREASURY,
BUREAU OF GOVERNMENT FINANCIAL OPERATIONS,
AUSTIN DISBURSING CENTER

Respondent

and

NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 214

Charging Party[1]

Case No. 6-CA-675

Arthur S. Rosenzweig, Esq.
For the Respondent

Susan E. Jelen, Esq.
For the General Counsel

Henry H. Robinson, Esq.
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

This proceeding arose under the Federal Service Labor-Management Relations Statute (herein called the Statute or the Act). It is based on a charge filed on August 4, 1980 by National Treasury Employees Union and NTEU Chapter 214 (herein called the Union) against Department of the Treasury, Bureau of Government Financial Operations, Austin Disbursing Center (herein called the Respondent).

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[1] While the charge includes the National Union as a party, the pleadings, stipulation and all briefs exclude that entity as a party herein.

A Complaint and Notice of Hearing, predicated on said charge, was issued on October 20, 1980 by the Regional Director, for the Federal Labor Relations Authority, Dallas, Texas Region. The said complaint alleged that on or about July 3 and 22, 1980 Respondent refused to bargain with the Union, as the representative of unit employees, by unilaterally changing conditions of employment by altering established past practice concerning the filling of Computer Trainee positions without notice to, or bargaining with, the Union re the impact and implementation thereof - all in violation of Sections 7116(a)(1), and (5) of the Act.

Respondent filed an answer to the complaint, dated November 25, 1980, in which it denied the aforesaid allegations and the commission of any unfair labor practices.[2/]

Thereafter, in a Stipulation executed by Respondent on June 23, 1981 and by the General Counsel on July 7, 1981, the parties waived a hearing before an Administrative Law Judge. It was further provided therein that the Stipulation, which incorporated the agreed upon facts, together with the specified exhibits would constitute the entire record in this matter.

Subsequently briefs were filed by the Union on August 10, 1981, and by General Counsel as well as Respondent on August 17, 1981. A motion was filed by the Union on September 10, 1981 to strike certain allegations and argument from Respondent's brief. Specifically, it was contended: (a) that the sixth sentence of the first paragraph therein under "Statement of Facts" contradicted the Stipulation; (b) that the first and third sentences of the second paragraph under "Statement of Facts" alleged facts not a part of the record; (c) that the second sentence of the fifth paragraph under "Statement of Facts" alleged facts not a part of the record; (d) that the third paragraph of item I under "Analysis and Discussion" refers to and relies upon (1) a merit promotion plan under Chapter 2000, Part VII of Respondent's Manual of Administration, (2) an office Memorandum No. 73-1, dated June 22, 1976, Merit Promotion Plan of the Austin Disbursing Center - all of which documents are not a part of the record; (e) that the sixth sentence of the second

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[2/] A motion to dismiss the complaint was filed by Respondent on May 1, 1981. It alleged that the complaint, apart from being nebulous in nature, neither set forth the established past practices nor apprised Respondent of its meaningful conduct. An order issued by the undersigned on June 25, 1981 denied the motion and upheld the sufficiency of the complaint.

paragraph under "Summary and Conclusions" implies that management unilaterally changed the grade of the position to comply with a government-wide regulation.

In regard to the contentions set forth in (a) through (d) above, I am persuaded that the motion is meritorious. Accordingly, it is granted in those respects, and the undersigned will not consider the particular facts or documents mentioned in the specified sentences included under "Statement of Facts" and "Analysis and Discussion" of Respondent's brief. In regard to the contention set forth as described in (e) above, contained under "Summary and Conclusions", the motion is denied. It is true that no evidence appears in the Stipulation to reflect that Respondent's actions were induced by government regulations. However, I view the statement as argumentative in nature - albeit negatively postured - and not an affirmative assertion of fact.

On the basis of the Stipulation herein, together with the Exhibits agreed upon by the parties, I hereby make the following Findings of Fact and Conclusions:

Findings of Fact

1. At all times material herein National Treasury Employees Union, Chapter 214 has been, and still is, the exclusive bargaining representative of all non-supervisory, non-professional general schedule employees of the Bureau of Government Financial Operations, Division of Disbursement, Austin Disbursing Center, exluding all professional, management officials, confidential employees, secretaries to the Director and Assistant Director, part-time intermittents, employees engaged in Federal personal work in other than a purely clerical capacity and supervisors as defined in Executive Order 11491, as amended.

2. In the operation of its disbursement center at Austin, Texas Respondent has four positions or levels of computer operator.

(a) The GS-332-04 computer operator trainee (referred to as GS-4) who undergoes practical (on the job) training in basic operation of switches, keys, and controls; in reading indicator lights and in effecting standard corrective measures to place the equipment back in production. He undertakes production assisgnments on the IBM Mod 30/24 K System and over IBM Mod 30/64 K Computer systems;

(b) The GS-332-05 computer operator (referred to as GS-5) who operates the IBM Mod 30/24 K System and assists in the operation of the IBM Mod 30/64 K System. In contrast to the requirements imposed upon the operator-trainee,[3] this computer operator must have sufficient knowledge of the computer systems, components, equipment and instructions to perform the duties using standard methods and techniques.

(c) The GS-332-06 computer operator (referred to as GS-6) who operates the IBM Mod 30 and Mod 40 computer system. This position requires extensive knowledge of reader, punch/printer, disk drives, machine logic, tape processing, registers, *et. al*. The incumbent must have the requisite skill to set up and dismantle all input/output devices and programs, to operate the system and moniter it for errors, to use utility programs and control devices, and to mount multiple input for processing one run.

(d) The GS-332-07 computer operator (referred to as GS-7) who operates the same IBM Mod 30 and Mod 40 computer systems as the GS-6 operator. In respect to the knowledge required for this position, the GS-7 incumbent must possess extensive knowledge of the capabilities and characteristics of the systems and the component devices. The said incumbent performs without direct supervision. While the GS-6 operator's work is checked by the supervisor, this operator is expected to work without close supervision.

3. For a period of approximately two years prior to July 1980, Respondent announced vacancies for the position of computer operator trainee at the GS-4 or GS-5 level. The Grade 4 operator was a trainee position, whereas Grade 5 was the journeyman level for the GS 4/5 career ladder position. There was a position description applicable to all GS-4 computer operator trainees at Respondent's facility, and a separate position description applied to all GS-5 computer operators. Due to a high turnover the position had been filled numerous times during this period at the GS-4 level in the GS 4/5 career ladder. Other nonsupervisory computer operator positions were announced periodically at GS-6 and GS-7 grade levels.

4. On July 3, 1980 Respondent posted Vacancy Announcement 80-13, Computer Operator GS-332-6. During the two year period prior thereto, a

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[3] The GS-4 incumbent is required to have adequate aptitude and appropriate qualifications to insure learning computer operations and the various instructions.

GS 4/5 career ladder position had existed for the shift in Vacancy Announcement 80-13. This particular GS 4/5 position had become vacant on this shift, and the aforesaid Announcement changed the GS 4/5 position to a GS-6 position.[4] No prior notice was given by Respondent to the Union of the decision to post the position at the GS-6 level.

5. Only one individual applied for the GS-6 position posted in Vacancy Announcement 80-13. Although consideration was given to said applicant, the selecting official declined to make a selection. It was suggested by the official that the Agency expand the grade structure of the vacancy to include GS-4 and 5 trainee positions and thus obtain additional candidates for the position. The selecting official also expanded the area of consideration by including applicants from the OPM register.

6. The position was reannounced by Respondent on July 22, 1980 in Vacancy Announcement 80-14 as Computer Operator GS-332-4/5/6. It was never posted at the GS 4/5/6 level prior thereto, and no notice was given by Respondent to the Union of the decision to so post the position on July 22, 1980. Subsequent to the Annoucement the position was filled at the GS-6 level but, as set forth in the Stipulation herein, it became vacant again.[5]

Conclusions

General Counsel and the Union herein both assert that Respondent's action, in changing the grade structure of the computer operater positions without notifying the bargaining representative, was violative of the Act. It is contended that the employer altered its past practice of two years whereby the computer operator trainee was filled at either the GS-4 or GS-5 level. This occurred, it is argued, on July 3, 1980 when the Vacancy Announcement 80-13 changed the GS 4/5 position, as it existed for that particular shift, to a GS-6 position. Moreover, a change occurred again on July 22, 1980 in Vacancy Announcement 80-14 whereby the position was reannounced at the GS 4/5/6 level. Since notification thereof was not given the Union in either instance, the representative was not afforded the opportunity to bargain re the impact and implementation of the grade changes.

Respondent insists that the issuance of Announcement 80-13 was an act in accordance with its statutory duty of assigning an appropriate grade to a configuration of duties and responsibilities; that announcing a position at its correct grade was not a change in procedures for filling a vacancy; and that no departure occurred from the codified merit protection plan. The employer asserts it conducted a secondary search for qualified candidates when it expanded the area of consideration, and this procedure was allegedly consistent with past practice. Further, no adverse impact resulted from this expansion, but, contrariwise, an opportunity was afforded employees to compete for a higher level job (GS-6).

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[4] Eligibility requirements differed for Grades GS-4, 5, and 6.

[5] As of July 7, 1981, the last signature date on the Stipulation, this position was still vacant and unfilled.

Several issues are posed herein for determination: (1) whether the vacancy announcements of July 3, 1980 and July 22, 1980, with the specified grade openings for computer operators, constituted a change in the past practice of filling computer trainee positions; (2) assuming arguendo such a change was effected, whether the assignment of different grades for the vacancy on said dates required management to notify the bargaining representative, and thus afford the latter an opportunity to bargain re impact and implementation; (3) whether a sufficient impact existed, by reason of any such changes, concerning which the Union was entitled to request an opportunity to bargain.

(1) Respondent takes the position that its actions in announcing the computer operator positions at GS-6 or GS 4/5/6, as set forth in Vacancy Announcements 80-13 and 80-14, were not inconsistent with past practice. It contends there was no change in procedures for filling a vacancy.

The stipulated facts, however, belie this contention. As reflected in paragraph 7 of the Stipulation, the GS 4/5 career ladder position had existed for two years prior to July 1980 for the particular shift in Vacancy Announcement 80-13. When Respondent saw fit in said announcement to post the 4/5 position as a GS-6 on July 3, this action altered the number of eligibles for the position. The qualification for a GS-6 computer operator differed to a significant extent from those required of the lower grade or trainee operator. While it might be argued that the employer merely sought an additional GS-6 operator, the stipulation herein asserts that "the vacancy announcement changed the GS-4/5 position to a GS-6 position" (underscoring supplied). It thus appears from the foregoing stipulated facts that the particular 4/5 position became vacant on the shift; that management sought to fill same with a GS-6 computer operator in the July 3, 1980 Vacancy Announcement. Since it does not appear that Respondent, for at least two years prior thereto, announced vacancies for the 4/5 level at any other grade, I am constrained to conclude that replacing this particular vacancy with a GS-6 operator constituted a change in past practice with respect thereto.

In respect to Vacancy Announcement 80-14, which reannounced on July 22, 1980 the same computer operator position as GS 4/5/6, such actions likewise involved a change in regard thereto. While Respondent argues it merely expanded the area of consideration - which may well have been its motive - the position then became available for members from all three classes. This announcement, while not excluding the 4/5 categories, no longer restricted the position to a GS-6 grade. As appear in paragraph 8 of the Stipulation herein, this policy represented the first occasion the job was posted as a GS 4/5/6/ level. Accordingly, I conclude that the action taken in Vacancy Announcement 80-14, whereby management posted the shift vacancy for a GS 4/5 position as a GS 4/5/6/ involved a change in regard to the filling of said vacancy.

(2) The principle is now well settled in the public sector, that, while certain management decisions impose no obligation on the part of management to bargain re same, an employer may be required to negotiate as to the procedures which will be followed in taking such actions and as to the impact upon adversely effected employees. Department of Treasury, Internal Revenue Service, Jacksonville District, 3 FLRA No. 103 and cases cited therein; Federal Railroad Administration, A/SLMR No. 418. In such instances where management rights limit the bargaining obligations of the employer, notification must be given the Union before action is taken so that the latter may request negotiations re the procedures to be observed or the adverse impact upon employees. In the case at bar the General Counsel does not challenge Respondent's decision to change the grade of the vacant position, as occurred in the Vacancy Announements 80-13 and 80-14. It is insisted that management should have notified the Union and negotiated its impact upon employees.

Respondent urges that it assigned an appropriate grade to a configuration of duties and responsibilites when it issued the Vacancy Announcements. It contends that since grades of vacant positions are dictated by general classification principles, a correspondence of the grade to its duties and responsibilities allows the employer to fix the grade accordingly. Thus, the question is also presented for determination as to whether a grade concerns a condition of employment which management may not change unless it negotiates the impact of such action.

Under Section 7103(a)(14) of the Act it is provided that the term "condition of employment" does not include policies, practices and matters relating to the classification of any position. Thus, if it be concluded that the change effected herein involved reclassifying the computer operator position, serious doubts could be raised as to any obligation on the part of Respondent to bargain even as to the impact of such action. This follows from the statutory language, supra, which recites that matters relating to classification of a position are not conditions of employment. Apart from this, however, I am unable to conclude that the terms "grade" and "classification" are synonymous in meaning. Support for this conclusion derives from the different definitions ascribed to each term in 5 C.F.R. 511.01(c) and (d). The regulations therein define "classification" as the analysis and identification of a position and placing it in a class under the position-classification plan established by OPM; the term "grade" means all classes of positions which are sufficiently equivalent as to difficulty, responsibility, and qualification requirements to warrant inclusion within one range or rates of basis pay.

Note is also taken that while the mention is made of the term "grade" in Section 7103(a)(14) of the Act, which excluded matters relating to "classification" as conditions of employment, the Statute does refer to "grades" in Section 7106(b)(1). In the latter section it is specifically provided that, at the election of the agency, the parties may negotiate as to grades of employees. Although no decision[6/] appears to have resolved the question, I am persuaded that the term "grade" is referable to the rate of pay for a particular position - albeit in conjunction with the class of the position; that the term "classification", as stated in the aforesaid regulation, identifies a particular position. Accordingly, I conclude that the grade of a position is embraced within the term "condition of employment" and, although within the management rights provision of Section 7106(b)(1) of the Act, a change thereof is bargainable as to impact and implementation.

(3) Having concluded that Respondent's Vacancy Announcements on July 3, 1980 and July 22, 1980 constituted unilateral changes of employment conditions, and that the employer failed to give notification thereof to the Union herein, such action ran afoul of the Act unless it be determined that no substantial impact resulted.

Cases arising under Executive Order 11491; as amended - the forerunner of the Act - have enunicated the doctrine that an employer is only required to negotiate matters or issues which affect employees in a substantial manner. Department of Defence, Air National Guard, 6 A/SLMR 591. This ruling has been followed by the Authority in cases which arose under the Act. Thus, in Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region, 45 FLRA No. 45, no adverse impact upon employees was found to have resulted from a temporary assignment by management of a field representative to the position of acting operations supervisor. Apart from the fact that those employees who filled in for the field representative did not have their workload increased, it was concluded that the additional burden on the remaining claim representatives was very slight. Therefore any impact flowing from the said assignment was deemed insubstantial. Note is also taken of the decision issued by Administrative Law Judge Francis E. Dowd in U.S. Government Printing Office, 3-CA-549 (April 9, 1981). In the cited case Judge Dowd utilized the reasonable likelihood test in determining whether a reorganization of a production department adversely affected employees. Concluding that this test was implicit in prior decisions, be rejected the theory that actual existent impact must be shown. Contrariwise, it

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[6/] In U.S. Department of Air Force Systems Command et. al., 5 FLRA No. 88 the employer changed the grade of two electronic engineers from a GS-13 to GS-11. Although Respondent therein argued it was non-negotiable since the action taken related to a "classification" of a position, Judge Mason did not address the argument inasmuch as the employer did notify the Union of the proposed down gradings.

was determined to be sufficient that there existed a reasonable likelihood of substantial impact upon employer.

Applying the foregoing principles to the case at bar, I am persuaded that changing the GS 4/5 career ladder position to a GS-6, we well as the subsequent change in Vacancy Announcement 80-14, could well impact upon Respondent's employees. Questions are properly raised as to which operators will perform the trainee's assignments on the 30/24 K and 64 K computers; which shift employees would assist the GS-5 operator; and to what extent the work of the other GS-6 computer operator would be affected. Further, employees who might hope to qualify for the trainee (GS-4) positions were precluded from doing so by raising the vacancy to a GS-6 position. Promotion possibilities could thus be limited or foreclosed for some employees by, at least, the first change in Vacancy Announcement 80-13. It appears to the undersigned that changing the grade of a shift position, particularly in upgrading same, could well result in a substantial impact upon other employees in respect to work assignments.[7] Suffice it to say that, at the least, there is a reasonable likelihood of an adverse effect upon the workforce by virtue of Respondent's two changes herein.

In sum, I conclude that the unilateral changes in grade announcements by Respondent on July 3, 1980 and July 22, 1980, without notification to the bargaining representative herein so as to afford it an opportunity to request bargaining re such changes, were violative of Sections 7116(a)(1) and (5) of the Act.

Having found that Respondent violated Section 7116(a)(1) and (5) of the Act. I recommend the Authority adopt the following Order:

ORDER

Pursuant to Section 7118(a)(7) of the Federal Service Labor-Management Relations Statute and Section 2423.29 of the Rules and Regulations, it is hereby ORDERED that Department of the Treasury, Bureau of Government Financial Operations, Austin Disbursing Center, shall:

1. Cease and desist from:

(a) Unilaterally changing grade level of vacant positions, and posting such changes in Vacancy Announcements, without notifying the National Treasury Employees Union, Chapter 214, the exclusive bargaining representative of its employees, and affording it the opportunity to meet and negotiate to the extent consonant with law and regulations, concerning the impact and implementation of such action.

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[7] Despite the Union's argument to the contrary, I am not constrained to conclude that by expanding the area of considerations there was a decline in morale. Such an alleged impact must, in my opinion, be predicated on subjective analysis.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative actions in order to effectuate the purpose and policies of the Federal Service Labor-Management Relations Statute.

(a) Notify the National Treasury Employees Union, Chapter 214, the exclusive bargaining representative of its employees, of any decision to change grade levels of vacant positions, and its intention to post such changes in Vacancy Announcements, in the unit represented by National Treasury Employees Union, Chapter 214, and, upon request, meet and negotiate, to the extent consonant with law and regulations, concerning the impact and implementation of such action.

(b) Post at its facilities at Austin, Texas, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such form they shall be signed by the facility's Director, and they shall be posted for 60 consecutive days thereafter in conspicuous places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the Federal Labor Relations Authority in writing, within 30 days from the date of this Order, as to what steps have been taken to comply therewith.

William Naimark

WILLIAM NAIMARK
Administrative Law Judge

Dated: January 25, 1982
Washington, D.C.

[6-CA-675]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We hereby notify our employees that:

WE WILL NOT unilaterally change grade levels of vacant positions, or post such changes in Vacancy Announcements, without first notifying the National Treasury Employees Union, Chapter 214, and affording such representative the opportunity to meet and negotiate, to the extent consonant with law and regulations, on the impact and implementation of such actions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL notify the National Treasury Employees Union, Chapter 214, the exclusive bargaining representative of our employees, of any decision to change grade levels of vacant positions, and our intention to post such changes in Vacancy Announcements, in the unit represented by National Treasury Employees Union, Chapter 214, and, upon request, meet and negotiate, to the extent consonant with law and regulations, concerning the impact and implementation of such action.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other materials.

If employees have any question concerning this Notice, or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region VI, whose address is: Bryan & Ervay Street, Old Post Office Building, Room 450, Dallas, TX 75221; and telephone number is (214) 767-4996.

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Federal Labor Relations Authority

Washington, D.C. 20424

Number 7

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

March 26, 1982

UNFAIR LABOR PRACTICE CASES

6-CA-862 (March 26, 1982)

United States Army Air Defense Center and Fort Bliss, Fort Bliss, Texas and National Association of Government Employees, Local R14-89

8-CA-432 and 8-CA-671 (March 26, 1982)

Davis-Monthan Air Force Base, Tucson, Arizona and American Federation of Government Employees, AFL-CIO, Case No. 8-CA-432 and Davis-Monthan Air Force Base, Tucson, Arizona and American Federation of Government Employees, Local 2924, AFL-CIO, Case No. 8-CA-671

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* THIS REPORT SERIES INCLUDES DECISIONS AND ORDERS OF FLRA ADMINSITRATIVE LAW JUDGES TO WHICH NO EXCEPTIONS WERE FILED WITH THE AUTHORITY WITHIN THE PRESCRIBED TIME LIMIT. IN ACCORDANCE WITH SECTION 2423.29(a) OF THE AUTHORITY'S RULES AND REGULATIONS, AS AMENDED (46 FED. REG. 40674 (1981)), THE FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS IN SUCH ALJ DECISIONS CONSTITUTE, WITHOUT PRECEDENTIAL SIGNIFICANCE, FINDINGS, CONCLUSIONS, DECISIONS AND ORDERS OF THE AUTHORITY.

Y 3. F 31/21-3:

[6-CA-862]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES ARMY AIR DEFENSE
CENTER AND FORT BLISS,
FORT BLISS, TEXAS

(Respondent)

and

Case No. 6-CA-862

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R14-89

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceedings on January 21, 1982, finding that the Respondent had engaged in an alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative actions. The Administrative Law Judge further found that the Respondent had not engaged in other alleged unfair labor practices as set forth in the complaint and recommended that as to those allegations the complaint be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (46 Fed. Reg. 40674 (1981)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusion, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violation and take affirmative action set forth in the Order. All other charges in the complaint are hereby dismissed.

For the Authority.

Issued, Washington, D.C., March 26, 1982

James J. Shepard

James J. Shepard, Executive Director

[6-CA-862]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

UNITED STATES ARMY AIR DEFENSE
CENTER AND FORT BLISS,
FORT BLISS, TEXAS

Respondent

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R14-89

Charging Party

Case No. 6-CA-862

Captain Wilbur L. Tomlinson
For the Respondent

Elizabeth A. Martinez, Esq.
For the General Counsel

Before: ALAN W. HEIFETZ
Administrative Law Judge

DECISION

Statement of the Case

This proceeding arose pursuant to the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 et seq., as a result of an unfair labor practice charge filed on December 1, 1980, and amended February 5, 1981. On July 16, 1981, the Regional Director issued a First Amended Complaint and Notice of Hearing alleging that the United States Army Air Defense Center and Fort Bliss (Respondent) violated 5 U.S.C. 7116(a)(1) and (5) by unilaterally implementing changes in tours of duty, and subsections (a)(1), (5) and (8) by conducting a formal discussion with employees concerning those changes without affording the Union an opportunity to be present. At the hearing, the Complaint was further amended to allege a separate violation of subsections (a)(1) and (5) in bypassing the Union and dealing directly with employees of the bargaining unit concerning the changes in tours of duty. Respondent denies all charges.

A hearing was held in El Paso, Texas, at which all parties were afforded full opportunity to examine witnesses, to introduce evidence and to file briefs. Upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommended order:

FINDINGS OF FACT

During 1980, the Management Information Systems Office (MISO)[1] at Fort Bliss relocated to a new building and upgraded its computer equipment. In order fully to maximize use of the new equipment, a new method for scheduling employees' tours of duty was devised which would result in weekly schedules in which four of the 16 MISO operators would have nonconsecutive days off.

On October 1, 1980, the Chief of the Machine Operations Branch, Frank Ronquillo, called Shop Steward Jesse Flores into his office to advise him of the proposed change. Mr. Ronquillo showed Mr. Flores three schedules: the old one, a new one referring only to military or civilian positions, and a new one with names of employees.[2] The schedules showed that two bargaining unit employees and two military employees would be affected each week. Mr. Ronquillo also gave a verbal explanation of how the new system would work. He advised Mr. Flores that management desired to implement the new schedule on October 19, 1980. Both men agreed to work on the schedule to see if it could be improved.

On October 3 they met again and discussed two personnel changes in the Office. Mr. Flores later contacted Chief Steward Joan Foran to advise her of the discussion. She told him that the Union needed more information concerning the proposed change.

On October 6 Mr. Ronquillo phoned Mr. Flores at home to inform him that management intended to post the proposed schedule so that it could become effective on the 19th. Mr. Flores pointed out that the collective bargaining agreement provided for a two week notice for proposed changes in schedule and that the Union had not had sufficient time to consider the proposed change. As a result, management agreed to postpone the implementation of the new schedule until the next six week change in tours began.

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[1] Now known as the Automated Management Office.

[2] Although Mr. Flores believes that he was not shown a schedule with names on it at this time, it is not disputed that three schedules were shown to him. His testimony does not indicate the nature of the third schedule. I credit Mr. Ronquillo's testimony that one schedule did have names on it.

Mr. Flores, on two occasions, requested written justification for the proposed schedule change. Mr. Ronquillo prepared a memorandum dated October 9 to satisfy that request. In addition, Lt. Col. Leonard, Chief, MISO, prepared a memorandum dated October 10, for Mr. Flores. That memorandum requested that the Union respond to the proposed changes no later than October 27 and advised that management desired to implement the changes starting with the six week schedule which was to begin November 30, 1980. Mr. Flores received these memorandums on October 11, 1980. He advised Ms. Foran of them on October 17.[3]

By memorandum dated October 14, 1980, Mr. Ronquillo advised each employee of the proposed changes in tours of duty and the justification for it. The memorandum stated, "You may, if you wish, submit your views in writing for possible consideration before the change in the tour is implemented." Mr. Flores was shown as receiving, and did receive as Shop Steward, a copy of this memorandum. No employee submitted written comments but one employee who was upset by the proposal stopped Mr. Ronquillo and asked why the change was being made. He reiterated what was contained in the memorandum.

On Friday, the 17th of October, Mr. Flores met with Ms. Foran who, in turn, met with Mary Bayer, Local Union President. This was Ms. Bayer's last work day before going on leave for two weeks. On October 23, the Union notified management for the first time that it wished to invoke impact bargaining. Ms. Foran signed one memorandum invoking impact bargaining and Mr. Flores signed another. Ms. Foran refused to initiate bargaining while Ms. Bayer was on leave.

When Ms. Bayer returned to work on Monday, November 3, Labor Relations Specialist, Eloiso DeAvila called her to discuss the request for impact bargaining. He told her that mangement desired to start negotiations promptly because the proposed implementation date was November 30. Ms. Bayer responded that she could not talk to Mr. Flores until November 6 and she stated that perhaps after talking to Mr. Flores and Ms. Foran, the Union might withdraw its request for impact bargaining. As she promised, she called Mr. DeAvila on the 6th but only to tell him that she had not as yet spoken to Mr. Flores.[4]

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[3] Mr. Flores was on sick leave October 9 and 10 (Thursday and Friday). His regular days off were Mondays and Tuesdays but because Wednesday, the 15th was a holiday, he did not report to work until Thursday, the 16th.

[4] I credit Mr. DeAvila's testimony in regard to the facts found in this paragraph. Ms. Bayer's memory of these events was not good. For example, Mr. Flores's own testimony indicates that he told Ms. Bayer that he had scheduled leave for November 6.

On November 7, Ms. Bayer called Mr. DeAvila to inform him that the Union did wish to impact bargain, but that because of leave she wished to take, she would not be available until November 13. They then agreed to meet on the 13th for the purpose of establishing ground rules for bargaining. However, Ms. Bayer called Mr. DeAvila on the 13th to cancel the meeting. She stated that she had been unable to contact Mr. Flores because he was on the night shift. She suggested that the meeting be held on November 19 because she did not want to negotiate ground rules without Mr. Flores present. Mr. DeAvila reiterated the desire of management to get negotiations underway and suggested that Mr. Flores' presence was not necessary for establishing ground rules. They then agreed to meet on November 19.

On November 14, Mr. DeAvila called Ms. Bayer to advise her that management was going to post the new schedule on November 15 in order to comply with the two week notice requirement in the negotiated agreement. She indicated that she might file an unfair labor practice charge but she did not cancel the meeting set for the nineteenth.

Ms. Bayer and Mr. Flores arrived at the meeting on November 19 and presented Mr. DeAvila with a letter stating that the meeting was being postponed, that posting of the notice of the new schedule was an act of bad faith, and that if the notice were not removed by Friday at 3:30 p.m., the Union would file an unfair labor practice charge. Mr. DeAvila explained why the notice was posted and indicated management's willingness to negotiate. However, management would not remove the notice and, on November 30, 1980, the schedule change was implemented. The Union refused to negotiate under the circumstances and the charge in this case resulted.

DISCUSSION AND CONCLUSIONS

Disregard of an exclusive representative and an attempt to deal directly with employees concerning grievances, personnel policies and practices is an act in derogation of the right of the exclusive bargaining representative to function on behalf of unit employees. Notwithstanding that the memorandum to employees dated October 14, 1980, was intended to comply with personnel regulations which state that "if possible the views of labor organizations and employees should be obtained as to the exact tours to be established,"[5] the direct solicitation of the individual views of employees disregards the statutory notion of exclusivity accorded the labor organization selected by unit employees. The fact that no comments were received in response to the memorandum is merely evidence that the negotiating posture of the exclusive representative was not, in fact, affected by the distribution of the memorandum. In view of the existence of the pertinent civilian personnel regulations, a cease and desist order will ensure that similar violations do not occur in the future.

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[5] Joint Exhibit 2; CPR 990-2 (c 19), 610. S1, S1-4(d)(6).

Although Counsel for the General Counsel argues that Respondent failed to comply with Section 7114(a)(2)(A) of the Statute by conducting a formal discussion of the proposed change with employees, the evidence merely shows that one employee, who was upset by the proposal, stopped Mr. Ronquillo to ask for a justification of the change. The most one can conclude from this evidence is that this casual meeting was at the instance of the employee. Without more, I conclude that a *prima facie* case has not been made under this section of the Statute.6/

Counsel for the General Counsel argues that Respondent has violated Sections 7116(a)(1) and (5) by implementing changes in tours of duty for employees without affording the Union proper notice and an opportunity to negotiate over the impact and implementation of those changes.7/ The theory is that Respondent did not provide the Union "with a meaningful opportunity to bargain" because by posting the schedules on November 15, 1980, Respondent presented the Union with a *fait accompli* and the Union was not then obligated to engage in a futile gesture of going forward with bargaining. Respondent's position is that it was at all times ready and willing to negotiate in good faith concerning the impact and implementation of the change in tours of duty and that the actions of the Union amounted to a refusal to bargain.

The pertinent section of the Statute is 7114(b)(1)(2) and (3) which provides:

> (b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--
>
> (1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

6/ *See* the comprehensive opinion of Judge Cappello in *Department of Health and Human Services, Social Security Administration, San Francisco Region*, Case No. 9-CA-578, OALJ-82-15 (November 30, 1981), which sets forth criteria by which a determination may be made as to whether a discussion is "formal" within the meaning of the Statute.

7/ Since the issue of proper notice is not discussed beyond its merely being set forth as an issue in the case, I construe the omission of such discussion, especially in light of the absence of any evidence on the matter, to constitute a waiver of that issue.

> (2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;
>
> (3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays.

In an effort to tailor manpower needs with upgraded equipment, Respondent desired to change tours of duty without undue delay. Faced with a contract obligation to give the Union and employees with at least two weeks' notice of such a change, Mr. Ronquillo met with Mr. Flores on October 1, 1980, to tell him of the proposal to make the change on October 19, more than two weeks later. Because the Union desired written justification for the change, even though an oral explanation had been tendered and written proposed schedules had been shown to Mr. Flores, Respondent agreed to postpone the change for an additional six weeks. The Union was given from October 11, the date Mr. Flores received Lt. Col. Leonard's memo, to October 27 to respond to the proposed changes. The Union did not demand impact bargaining until October 23. It was not available to discuss ground rules until November 13 and, even then, it postponed the first meeting until November 19, four days later than the date it knew Respondent would have to post the proposed schedule in order to make it effective on November 30.

The long and short of the matter is that the Union was notified on October 1 of the proposed change but it did not go into effect until November 30, almost two months later. While one is sympathetic to the needs and desires of Union officials to take leave, and their reluctance to delegate authority to their subordinates, the business of the Government must go on and unions must be able to function continuously as well. The absence of one official, whether out of convenience or necessity, ordinarily should not operate, or be permitted to operate so as to paralyze the Government or a union. Here, there has been no showing that any one individual's presence was necessary for bargaining purposes or that at least one person was not available to sit down with management to discuss ground rules and begin bargaining just after the union invoked impact bargaining on the 23rd of October. It is not unreasonable to expect that while the Union president was away for two weeks, the Shop Steward and the Chief Steward would get together for the purpose of suggesting a negotiating posture for the Union president to take on the matters at issue. It is also not unreasonable to expect that when the Union president returned, she would be prepared to sit down with management before the expiration of two and one-half weeks' time. Under the circumstances, the actions of the Union do not fall within the prescriptions of Section 7114(b)(1), (2) and (3) and, therefore, the action of Respondent in posting the schedule on November 15 in order to comply with the two week notice provision was not unreasonable.

Given this set of circumstances, I conclude that Respondent has not been shown to have violated Sections 7116(a)(1) and (5) by implementing changes in tours of duty on November 30, 1980. Although I find that Respondent has violated those sections in that it bypassed the Union and dealt directly with employees of the bargaining unit concerning the changes in tours of duty, under the circumstances of this case, I do not find the imposition of a status quo ante remedy to be appropriate.[8] Accordingly, I recommend that the Authority issue the following:

ORDER

ORDERED, that the United States Army Air Defense Center and Fort Bliss, Fort Bliss, Texas shall:

1. Cease and desist from:

   (a) Bypassing the National Association of Government Employees, R14-85, the exclusive representative for all full-time non-supervisory General Schedule Appropriated Fund employees, and dealing directly with employees in the bargaining unit concerning changes in tours of duty.

   (b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

   (a) Post at its facilities copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by an authorized representative and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material.

   (b) Notify the Federal Labor Relations Authority in writing within 30 days from the date of this Order as to what steps have been taken to comply with the Order.

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[8] Cf. United States Air Force, Air Force Logistics Command, Aerospace Guidance and Metrology Center, Newark, Ohio, 4 FLRA No. 70 (Oct. 24, 1980).

FURTHER ORDERED, that as to all other charges contained therein, the Complaint in Case No. 6-CA-862 is dismissed.

ALAN W. HEIFETZ
Administrative Law Judge

Dated: January 21, 1982
Washington, D.C.

[6-CA-862]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT bypass the National Association of Government Employees, Local R14-89, the exclusive representative for all full-time non-supervisory General Schedule Appropriated Fund employees, and deal directly with employees in the bargaining unit concerning changes in tours of duty.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

____
(Agency or Activity)

Dated: ____________________ BY: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VI, whose address is: Bryan & Ervay Street, Old Post Office Building, Room 450, P.O. Box 2640, Dallas, Texas 75221 and whose telephone number is: (214) 767-4996.

[8-CA-432, 8-CA-671]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DAVIS-MONTHAN AIR FORCE BASE
TUCSON, ARIZONA

(Respondent)

and

Case No. 8-CA-432

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

(Charging Party)

DAVIS-MONTHAN AIR FORCE BASE
TUCSON, ARIZONA

(Respondent)

and

Case No. 8-CA-671

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2924, AFL-CIO

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on January 22, 1982, finding that the Respondent had engaged in certain unfair labor practices and recommending that the Respondent cease and desist therefrom and take certain affirmative actions. The Administrative Law Judge further found that the Respondent had not engaged in another alleged unfair labor practice as set forth in the consolidated complaint and recommended that, as to that allegation, the complaint be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (46 Fed. Reg. 40674 (1981)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., March 26, 1982

James J. Shepard

James J. Shepard, Executive Director

[8-CA-432, 8-CA-671]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DAVIS-MONTHAN AIR FORCE BASE
TUCSON, ARIZONA

Respondent

and

Case No.: 8-CA-432

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

DAVIS-MONTHAN AIR FORCE BASE
TUCSON, ARIZONA

Respondent

and

Case No.: 8-CA-671

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2924, AFL-CIO

Charging Party

Silvia M. Diaz, Esq.
For the General Counsel

Major Gordon B. Finley, Jr.
For the Respondent

Before: FRANCIS E. DOWD
Administrative Law Judge

DECISION

Preliminary Statement

This is a proceeding under the Federal Service Labor-Management Relations Statute, (Statute), 92 Stat. 1191, 5 U.S.C. §7101, et. seq. It was instituted by the Regional Director of Region 8 based upon two unfair labor practice charges filed separately by the American Federation of Government Employees, AFL-CIO, hereafter referred to as AFGE, and the American Federation of Government Employees, Local 2924, AFL-CIO, hereafter referred to as AFGE, Local 2924,[1] against Davis-Monthan Air Force Base, Tucson, Arizona, hereafter Respondent, alleging violations of the Statute. The original charge in Case No. 8-CA-432 was filed on April 3, 1980 and an amended charge was filed on June 30, 1980. A Complaint and Notice of Hearing was issued on July 24, 1980. In Case No. 8-CA-671 the original charge was filed on July 30, 1980 and an amended charge was filed on September 15, 1980. Subsequent to an investigation of Case No. 8-CA-671, an Order Consolidating Cases, Consolidated Complaint, and Notice of Hearing issued on September 17, 1980, in both cases.

In Case No. 8-CA-432, it is alleged that Respondent violated Section 7116(a)(1) and (5) by its refusal to permit Michael Coiro to participate in negotiations of the local Merit Promotion Plan at Respondent's facilities, and violated Seciton 7116(a)(1) and (8) by its refusal to authorize official time for Coiro to attend the same negotiations. Similarly, in Case No. 8-CA-671, the complaint alleges violations of Section 7116(a)(1) and (5) in that Respondent refused to approve the selection of Coiro to act as the designated representative of AFGE, Local 2924, on the Base Equal Employment Opportunity Advisory Committee because he was not a member of Local 2924's bargaining unit. As will be discussed later, Coiro was a member of a different unit at the same location, with a different exclusive representative, the National Federation of Federal Employees, Local 81.

Respondent's Answer to the Regional Director's original Complaint denied the allegations therein in all relevant parts, as did its Answer to the Regional Director's Consolidated Amended Complaint.

A hearing was held in Tucson, Arizona at which the parties were represented by counsel and afforded full opportunity to adduce evidence and call, examine, and cross-examine witnesses and argue orally. Briefs filed by Respondent and the General Counsel have been duly considered.[2]

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[1] Case No. 8-CA-432 was filed by the American Federation of Government Employees, AFL-CIO; Case No. 8-CA-671 was filed by the American Federation of Government Employees, Local 2924, AFL-CIO.

Upon consideration of the entire record in this case, including my evaluation of the testimony and evidence presented at the hearing, and from my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommended order.

Findings of Fact

1. American Federation of Government Employees Local 2924 is the recognized exclusive representative of a unit of non-supervisory wage grade employees serviced by the Civilian Personnel Office at Davis-Monthan Air Force Base, Tucson, Arizona. As the exclusive representative since about 1969, AFGE Local 2924 has acted for the employees in the unit by negotiating collective bargaining agreements with the management of Davis-Monthan Air Force Base. These employees are paid from appropriated funds (AF). The President of Local 2924, as of March 1980, was Warren Kossman. I shall refer to as the AFGE-AF unit.

2. National Federation of Federal Employees, Local 81 is the exclusive representative of two bargaining units. One unit consists of non-supervisory GS employees paid from a Non-Appropriated Fund (NAF), I shall refer to this unit, which is involved in this proceeding, as the NFFE-NAF unit. The second unit consists of non-supervisory GS employees, other than guards. These employees are paid from appropriated funds. (The guards excluded from this unit are in AFGE's unit.)

3. Michael T. Coiro was an employee in the AFGE-AF unit until April 1979 when he received a temporary promotion to a GS position in the NFFE-NAF unit. The promotion because permanent in March 1980 at about the same time Warren Kossman was elected President of AFGE Local 2924. Kossman thereupon appointed Coiro, who once was a steward for Local 2924 prior to April 1979, to a position as Trustee of Organization. In such position, he was expected to be involved in internal union matters not involving interface with management. Thus, he was responsible for making recommendations concerning changes in the union's constitution and by-laws and for overseeing members' proposals eventually resulting in referendums at union conventions. Coiro, who was not a member of the AFGE-AF unit, was also designated by Kossman to be Local 2924's representative for two other functions, each of which resulted in the charges in these cases.

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[2] An amicus curiae brief was also filed by John P. Helm, Labor Relations Specialist, on behalf of the Office of Personnel Management. This brief, which is confined to the official time issue, has been fully considered by the undersigned.

Case No. 8-CA-432

4. By letter dated March 4, Kossman advised Respondent that Coiro would be one of three people designated to represent AFGE in the negotiation of the new local Merit Promotion Plan. On the morning of March 12, George Wolfe, Respondent's Chief of the Labor-Management Relations Section, advised President Kossman that Coiro would not be provided official time because he was not a member of the bargaining unit. After his call to Kossman, Wolfe then called NFFE President Clifford Bales to "obtain permission" for Coiro to act as AFGE Local 2924's representative. Bales voiced his strong objection in the telephone call with Wolfe and agreed to confirm it in writing. Wolfe transmitted Bales' objection to Kossman in person that afternoon. When Kossman asked if he could see Bales' letter, Wolfe first called Bales, obtained his permission, and then gave the letter to Kossman. The letter (G.C. Exh. No. 3) stated NFFE's objection and requested management to "deny the nomination and compel AFGE to use their own negotiating resources and cease and desist their poaching of NFFE resources."

5. On the same date, March 12, a letter[3] was signed by James L. Murphy, Civilian Personnel Officer and delivered to Warren Kossman the following day at the first negotiations session. The letter stated that Mr. Coiro "will not be admitted to the negotiation of the Merit Promotion Plan" for the reason that NFFE was "within its rights" as exclusive representative to deny Coiro permission to act as negotiator.

6. Neither Coiro nor Local 2924 actually submitted a leave request (annual or LWOP) for Coiro to attend the negotiations. The first session took place March 13; the second session was on March 19. No one was designated to replace Coiro who, according to Kossman, was selected because of his communication skills and because he is an intelligent, highly agressive, and very capable person. Coiro had no prior experience as a negotiator.

Case No. 8-CA-671

7. Also on March 5, Kossman wrote a letter to Mr. Fidel Martinez, Asst. Equal Opportunity Advisor, designating Coiro as Local 2924's representative on the Base Equal Opportunity Advisory Committee. Martinez was unaware that Coiro was not a member of Local 2924's unit. He prepared Special Order A-120 dated March 7 and signed by Capt. David F. Clark, which appointed 16 individuals, including Coiro, to the Committee. Coiro received a notice on March 17 of the first meeting scheduled for March 28.

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[3] The record does not indicate who actually prepared the letter.

He attended the meeting and reported back to Kossman. Also attending the meeting and observing the presence of Coiro was Civilian Personnel Officer James L. Murphy. By letter dated April 17, Murphy advised Kossman that "we cannot accept Mr. Michael T. Coiro as AFGE's representative to the EEO Advisory Committee, since Mr. Coiro is a General Schedule (GS) employee and is automatically covered as a member of the NFFE bargaining unit and NFFE has taken strong exception to this type of action." The letter also requested a new designee. Kossman filed a written protest concerning Coiro's removal and substituted temporarily a new representative, John Suhay.

8. Article 23, Sections 1 and 2 of the Memorandum of Agreement (Jt. Exh. No. 1) between Respondent and AFGE, Local 2924, states in relevant part as follows:

> The Employer agrees that the Union has an inherent responsibility in the representation of Union members in appointive committees which may affect personnel policies, working conditions, or employee benefits.
>
> The Employer *will appoint* a representative and alternate *designated by the Union* to serve as committee members on the Base Incentive Awards Committee, Equal Employment Opportunity Committee, Safety Committees, previously discussed, and such other committees in which the Union has a vested *representative* responsibility. Appointive consideration will be made by the Employer to future committees which may affect working conditions and/or personal policies or which provide employee services such as base committee on combatting alcoholism or drug abuse. (Emphasis added.)

9. Joint Exhibit No. 2 is a page from AFR40-713 dated October 20, 1975. It states that members of the EEO Committee are appointed by the activity commander and will "include representatives from labor organizations with exclusive recognition, and employees and supervisors, who reflect the work force (minority/nonminority, men/women) characteristics and grade structure." The primary functions of the Committee, as set forth in Jt. Exh. No. 2 are as follows:

> (1) Review EEO complaints activity to analyze, identify and recommend affirmative action areas required to improve employment practices, policies, and procedures.
>
> (2) Assist in formulating the activity plan of action.
>
> (3) Review trends in personnel actions and procedures to determine whether personnel management practices are designed to afford all qualified candidates an opportunity for employment or career mobility.

(4) Monitor recruitment efforts to assure that all available sources have been tapped.

(5) Evaluate the EEO Program implementation and progress toward the objectives stated in the activity plan of actions.

10. Martinez testified that his final list of Committee members is submitted to the activity commander for approval. From the entire testimony of Martinez, however, I do not conclude that all names on the list were subject to approval. As set forth in Jt. Exh. No. 2, for example, it seems clear that membership for certain individuals and organizations were automatic and, therefore, not subject to approval. However, the activity commander (or his designee, Martinez) obviously had discretion to make appointments designed to achieve a representative group.

11. Further, I note that G.C. Exh. No. 6 lists one representative for AFGE Local 2924 and one for NFFE Local 81. Thus, although NFFE represents two units, it has only representative. It would appear, therefore, that no requirement existed whereby each unit was entitled to separate representation on the Committee.

ISSUES

A. Whether the statutory grant of official time in Section 7131(a) for employee participation in collective bargaining negotiations is limited to bargaining unit employees or whether it extends to non-unit employees.

B. Whether Respondent's refusal to grant official time to Coiro to participate in negotiations of the Merit Promotion Plan was a violation of Section 7116(a)(8) and (1).

C. Whether Respondent refused to permit Coiro to participate in the Merit Promotion Plan negotiations. If so, did Respondent thereby violate Section 7116(a)(5) and (1)?

D. Whether Respondent refused to approve the selection of Coiro as Local 2924's representative on the EEO Committee. If so, did Respondent thereby violate Section 7116(a)(5) and (1)?

Discussion and Conclusions of Law

A. Statutory Interpretation - Meaning of Section 7131(a),

Courts have long held that statutes are to be considered in their entirety and not as if each of their provisions was independent and unaffected by the others. See Alexander v. Cosden Pipe Line Co, 290 U.S. 484 (1933). The U.S. Supreme Court has also held that courts have some latitude to adopt a restricted rather than a literal reading of statutory language when the literal reading would lead to unreasonable or absurd results. See Helvering v. Hammel, 311 U.S. 504 (1946). The foregoing rules of statutory construction are applicable herein.

The resolution of the first issue presented in this case hinges upon the meaning which is given to section 7131(a) of the Statute. This section of the Statute provides:

> (a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceedings, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

Also of relevance to this discussion is Section 7131(d) which provides as follows:

> (d) Except as provided in the preceding subsection of this section -
>
> > (1) any employee representing an exclusive representative, or
> > (2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,
>
> shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

Respondent contends that section 7131 must be narrowly interpreted to mean that only employees representing an exclusive representative who are employed in the bargaining unit for which they are acting are entitled to official time. Thus, Respondent argues that the kind of employee described in Section 7131(a) is a "unit employee." The General Counsel, on the other hand, favors a broad interpretation of Section 7131(a) and argues that the word "employee" in this particular statutory context should receive the same meaning as in Section 7103(a)(2) where "employee" is defined as "an individual employed in an agency."

Generally, where the statutory language is not clear on its face - as in this case - resort is directed to the legislative history. Based upon my review of the legislative history, I have reached the following conclusions. First, no special significance may be placed on the use of the word "any" at the beginning of Section 7131(a). Second, the word "employee" and its meaning was not specifically discussed in terms of "who" Congress was talking about when it used the word employee in Section 7131(a). Third, the main thrust of all discussions on Section 7131 dealt with the subject matter of negotiations. Thus, it is quite clear that Section 7131(a) involves official time for contract negotiations and Section 7131(d) involves official time for all other matters. The question is whether Congress was consciously intending to give the word "employee" in Section 7131(a) a different meaning than in Section 7131(d). If so, why did Congress remain silent on the subject and not explain its reasons for such a significant and far reaching difference, if that, were the case? Why would Congress use the phrase "employee representing an exclusive representative" in both (a) and (d) but intend two different meanings, without explaining its reasons? Such an explanation was obviously called for. The answer, in my opinion, is that Congress did not intend two different meanings for the work "employee" in Section 7131(a) and (d). What Congress intended, I believe, is that the word "employee" meant the same thing in both (a) and (d) and, more specifically, Congress meant "unit employee".

This conclusion is supported by the legislative history, brief as it is. Thus, at H.R. Rep. No. 95-1403, 58-59, (95th Congress 2d Sess.1978), Legislative History, p. 704-705, the discussion of the official time provisions commenced with the following introductory statement: "This entire section provides standards for determining when an individual may or may not be authorized official time (paid time) to engage in activities concerning labor-management relations" (emphasis added). Thus, the focus was on individuals performing a variety of labor-management relations activities. The Report briefly explained the purpose of Section 7131(a), (b) and (c) and then summarized (d) (1) and (2) as follows:

> Section 7132(d)[4] makes all other matters concerning official time for unit employees engaged in labor-management relations activity subject to negotiation between the agency and the exclusively recognized labor organization involved (emphasis added).

The General Counsel argues that the foregoing statement represents a Congressional intent to differentiate between a broad authorization of official time for contract negotiations in Section 7131(a) and a narrow authorization to unit employees in Sec. 7131(b). This contention is rejected. The more likely interpretation advanced by Respondent, which I adopt, is that the entire phrase - "all other matters concerning unit employees" - relates back and encompasses Section 7131(a) and clearly demonstrates that Congress was speaking of unit employees in both (a) and (d). Indeed, the very absence of any legislative history discussing the scope of the word "employee" is convincing evidence to me that Congress simply assumed that the individuals engaged in collective bargaining and other "labor-management relations activity" were the same individuals affected by such bargaining, namely, employees in the bargaining unit.[5] This conclusion, as argued by Respondent, fits into the overall statutory scheme of encouraging collective bargaining and communications within appropriate units.

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[4] At that time, the provision was numbered Section 7132. It was later renumbered 7131 and passed without change in language.

Congressional recognition and emphasis on employees in appropriate bargaining units may be demonstrated by examining other sections of the Statute. In this case Congress expressed a clear statement of purpose in Section 7101 where it found that statutory protection of the employees' right to organize, to bargain collectively and to participate through their freely selected labor organizations in decisions affecting them "facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment."

The collective bargaining envisioned by Congress is to occur between the representative of an agency[6] and the exclusive representative of an appropriate unit. Collective bargaining is defined in Section 7103(a)(12) as follows:

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[5] A less likely conclusion would be that Congress - when it wrote Section 7131(a) - assumed that employees designated by the exclusive representative to negotiate contracts were different from employees in Section 7131(d) designated to perform other functions such as handling grievances and representing the union at formal discussions. Why would Congress differentiate between unit and non-unit employee representatives solely on the basis of the function to be performed? In the absence of any supporting legislative history, I am unable to attribute such an intention to Congress.

[6] Decisions under the Executive Order, as well as the Statute, show that the word "agency" has a variety of meanings. Section 2421.4 of the Authority's Rules and Regulations defines Activity as "any facility, organizational entity, or geographical subdivision or combination thereof, of any agency." Respondent correctly asserts that the word "Agency" has been construed to mean "Activity" by the Authority and correctly points out that elections have been conducted, unions have been recognized, and contracts negotiated in appropriate units at the "Activity" level of federal government agencies. Respondent correctly points out that the General Counsel, by relying on Section 7103(a)(2) and (3) has not confined its request for official time to the Activity or employing command, but rather, to any Agency. This broad interpretation will be discussed later.

> 'Collective bargaining' means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees . . . . (Emphasis added).

This language clearly shows Congress' obvious intent was to facilitate communication between an agency representative and the employees of a given unit over which the agency representative has managerial responsibility.

In order to provide a framework within which the defined collective bargaining can occur, Congress set up an elaborate system in Sections 7111 and 7112 to determine the appropriateness of units for labor organization representation and the designation of exclusive recognition. All of this is designed to ensure that employees with a clear and identifiable community of interest may effectively deal with their particular agency employer. Again we see the recurring theme of Congress' intent to encourage and facilitate bargaining and communication between employees of an appropriate unit and the agency managers in charge of that unit.

The Statute's central theme of providing bargaining rights about conditions of employment for employees in a given unit is further evidenced in Federal Labor Relations Autohrity decisions concerning the duty to bargain. They clearly point out that the duty to bargain does not extend to conditions of employment affecting non-bargaining unit employees. (See National Council of Field Labor Locals, American Federation of Government Employees and U.S. Department of Labor, 3 FLRA No. 44; International Association of Fire Fighters, Local F-61 and Philadelphia Naval Shipyard, 3 FLRA No. 66; and, for a recent decision involving official time under Section 7131(d), see American Federation of Government Employees, AFL-CIO, Local 3804, 7 FLRA No. 34 (Nov. 19, 1981). Thus, the Authority has found that, in encouraging bargaining and setting up a framework in which bargaining would occur, Congress clearly intended only to encourage bargaining within identified appropriate units and about subjects affecting those unit employees.

Of course, I realize there are some who would argue that since management has substantial latitude in making its selection of representatives for negotiations, it would be inequitable to impose limitations on unions. But the answer to this is that while Congress knowingly granted unions something under the Statute - official time for negotiations - that unions did not have under the Order, Congress also recognized that it was not giving unions full parity with agency management. Thus, Congressman William Ford in discussing Section 7132 (now Section 7131) stated clearly that even though agency management engaged in "interface" activities, including preparations, on official time, Section 7131(d) made these same interface activities a subject of negotiation as far as the exclusive representative is concerned. Legislative History, p. 957, Congressional Record H 9650 (Sept. 13, 1978). Also, Congress in Section 7131(a) knowingly permitted the agency to control or dictate the number of union representatives entitled to receive official time for contract negotiations. Indeed, if one reads Section 7131 in its entirety from (a) through (d), one should conclude that on the whole it contains more limitations on the rights of unions than it grants privileges. The only exception is the first sentence in Section 7131(a) which is the subject of this case. The use of official time in (b) is precluded, in (c) it is to be determined by the Authority, and in (d) it is subject to negotiation with the agency. Based upon the foregoing, I reject this "equitable" or "equal partner" argument.

As previously noted, Respondent also argues that a statute should not be interpreted in a manner which leads to an absurd result. Thus, it is argued that reliance on the General Counsel's broad interpretation of Section 7131(a) would mean that a Union - which admittedly has the right to designate its own representatives - could designate any employee of any agency anywhere in the world to represent them in contract negotiations.[7] There is genuine concern that under such a broad interpretation government employees would become professional negotiators for labor organizations and lead to government subsidization of the contract negotiation departments of labor organizations.[8] Coupled with this concern is the obvious opportunity for abuse. For example, if the bargaining unit is in San Diego, California and the Union designates as representatives non-unit employees from Seattle, Boston and Miami, would an agency have any right at all to challenge the resonableness of the Union's designations in light of the cost to the government in terms of money and efficiency of operations?[9] Under the General Counsel's theory, the Union's right to designate its own representatives is paramount and if the purpose is contract negotiations the agency is obligated by Section 7131(a) to provide official time and by the Authority's Interpretation and Guidance, 2 FLRA No. 31 (1979) to pay travel and per diem expenses. From my review of the legislative history it doesn't appear that Congress had this particular result in mind when it decided to provide employees with official time for contract negotiations. And, in my view, such a result, whether characterized as absurd or not, would at the very least place an unreasonable burden on the government. Further, such a broad interpretation of Section 7131(a) would extend a benefit to employees outside the bargaining unit without any legislative explanation.

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[7] And, in this regard, the question arises whether the phrase "negotiation of a collective bargaining agreement" in Section 7131(a) also encompasses any negotiations during the "life" of the contract changing the terms and conditions of employment which are in existence by virtue of a existing contract or established practice.

[8] The basic issue is not so much whether this is an absurd result but, rather, whether this particular result was contemplated or intended by Congress.

[9] In the case at bar, admittedly no travel and per diem is involved.

Finally, the General Counsel's broad interpretation of Section 7131(a) is, in my opinion, incompatible with the statutory mandate in Section 7101 which states "the provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient government." In its brief, Respondent makes the following argument against such a broad interpretation of the Statute:

> Certainly the General Counsel's position of an untrammeled right of union negotiators to official time and absence from their regular jobs without regard to separate employer limitations can hardly be said to be consistent with the requirement of an effective and efficient Government. The "special requirements and needs of the Government" cannot be met if one employer Activity is required to reduce its productive work effort and to subsidize, in whole or part, the negotiations being conducted with other employer Activities without any control whatsoever on job criticality, or number or employees it must release from their regular jobs, or the duration or frequency of such release, while at the same time being required to pay not only the regular pay, but also their costs of any travel and per diem, and even beyond that to be then confronted with the additional problems of how to reallocate the work or, regulations permitting, hire additional persons to take over the productive work normally performed by those employees. Respondent contends that Congress could not and did not so intend.

I find Respondent's argument to be persuasive not only because of the monetary cost involved but particularly because of the disruptive effects it has on the unit from which the designated representative has been selected. One of the responsibilities of agency management (and its labor relations advisors) is to explain to supervisors why employees under their supervision are entitled - by statute or contractual agreement - to be released from their jobs to conduct authorized labor-management relations activities on behalf of the exclusive representative. Such explanations are more readily understood when the representative's labor-management relations activities benefit the working conditions of his or her co-workers in the same unit at the same job site. But it is much more difficult to try and explain to a supervisor why his or her employee is leaving the city for several weeks to conduct contract negotiations for some other bargaining unit, or to explain why the employee is leaving the city for two days to fly from Cleveland to San Diego to attend a one-hour meeting concerning "negotiations." The only explanation, according to the General Counsel, is to simply say that these employees have a statutory right to official time for this particular purpose (i.e. "negotiations") because this is what Congress intended. It seems to me that if this really is what was contemplated by Congress there necessarily would be a lengthy discussion of this in the legislative history. Indeed, when one considers the number of pending cases[10] in which agencies are opposing the General Counsel's interpretation, it seems obvious that this controversial issue would have been raised by agency representatives in the proceedings before the House and the Senate, had there been any inkling that Section 7131(a) was being given or could be given the broad interpretation now requested by the General Counsel.

On balance, given a choice between a narrow or broad interpretation of the work "employee" in Section 7131(a), I conclude for the reasons discussed above that the statute should be construed narrowly. Accordingly, I find and conclude that the word "employee" in Section 7131(a) means "unit employee." This statutory interpretation, it seems to be, is more reasonable, less disruptive to labor management relations, and more consistent with other statutory provisions, especially including Sections 7101, 7111(a), 7112(a) and, 7114(a)(1) and (4). In this regard, Section 7112 states:

> (a)(1) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant,

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[10] U.S. Dept. of the Army, 94th U.S. Army Reserve Command, Hanscom Air Force Base, Bedford, Mass., 1-CA-274, stipulated to the Authority on Sept. 4, 1980; Sacramento Air Force Command, 9-CA-367, stipulated to the Authority on October 20, 1980; Little Creek Amphibious Base, 3-CA-382, 383, ALJ decision stated June 3, 1981; Veterans Administration, Cincinnati, Ohio, 5-CA-795, ALJ decision dated May 20, 1981; and United States Department of Defense, Department of the Air Force, San Antonio Air Logistics Center, Kelly Air Force Base, Texas, 6-CA-973, ALJ decision dated December 23, 1981. See also Veterans Administration, Muskogee, Oklahoma, 6-CA-399 et al, ALJ decision dated December 8, 1981; and Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 5-CA-470, 517, ALJ Decision dated May 27, 1981. In its brief, Respondent also cites U.S. Department of the Navy, Naval Submarine Base, New London, Conn., 1-CA-224.

> installation, functional, or other basis and shall determine any unit to be an appropriate unit *only* if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of the agency involved. [Emphasis added.]

Section 7112 determinations made by the Authority that certain employees have a "community of interest" and that establishment of such a unit "will promote effective dealings with, and efficiency of the operations of, the agency involved" are at the very heart of the statutory "procedures" referred to in Section 7101 to "meet the special requirements and needs of . . . an effective and efficient Government." Accordingly, Section 7131(a) when read in conjunction with other statutory provisions does not provide a statutory grant of official time to non-bargaining unit employees.[11]

B. Whether Respondent's refusal to grant official time to Coiro to participate in negotiations of the Merit Promotion Plan was a violation of Section 7116(a)(8) and (1).

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[11] In *National Federation of Federal Employees, Local 1451*, 3 FLRA No. 14, the Authority ruled nonnegotiable a proposal held to concern "matters which are beyond those directly affecting unit employees." The Authority also noted that the individuals (management representatives) who were the subject of the disputed proposals were not unit employees. The Authority has also held that an agency's obligation to bargain under the Statute extends only to "conditions of employment of bargaining unit employees." *International Association of Fire Fighters, Local F-61 and Philadelphia Naval Shipyard*, 3 FLRA No. 66, and *American Federation of Government Employees, AFL-CIO, Local 2*, 4 FLRA No. 60. In both these cases, the Authority further stated that even though the agencies had no *obligation* to bargain, they were not *prohibited* from doing so, at their own election. In a converse situation, the Authority unheld the union's refusal to negotiate an agency proposal which would have infringed upon the union's prerogative of designating its own representatives from *within the bargaining unit*. However, the Authority observed that "(T)his is not to say, however, that a union may not, if it so elects, bargain over such matters. Indeed, there is merit to formalizing the bargaining relationship to the extent that it would lead to stability at the workplace and, in fact, many collective bargaining agreements in the Federal Sector provide for a formalized bargaining relationship." *American Federation of Government Employees, AFL-CIO*, 4 FLRA No. 39.

Section 7116(a)(8) of the Statute makes it an unfair labor practice for an agency to "otherwise fail or refuse to comply with any provision of this chapter." There is no dispute and, I find, Respondent denied official time to Coiro. However, in the preceding section of this decision I concluded that Section 7131(a) of the Statute does not mandate official time for non-bargaining unit employees.[12] It follows, therefore, that Respondent had no statutory obligation to grant Coiro official time and did not violate Section 7116(a)(1) and (8) by its refusal.[13]

C. Whether Respondent refused to permit Coiro to participate in the Merit Promotion Plan negotiations. If so, did Respondent thereby violate Section 7116(a)(5) and (1)?

Respondent denies it refused Coiro permission to attend the negotiations. Respondent contends it never received a request from Coiro or Local 2924 that he be granted annual leave or LWOP, or to change the negotiations to off-duty hours. Instead, Respondent asserts that Wolfe merely advised Kossman of NFFE's position. While the record is inconclusive as to whether or not Wolfe specifically stated to Kossman in their second conversation of March 12th that Coiro could not be a negotiator, the conversation certainly had that import: Wolfe had sought Bales' permission regarding Coiro's negotiating activities as if to be guided by Bales' response; Wolfe made it a point to convey Bales' objection to Kossman almost immediately; and, Kossman did not send Coiro to negotiations apparently relying on his conversation with Wolfe. But, more importantly, Murphy's letter of March 12th, apparently given Kossman during the first negotiating session, is unequivocal as to Respondent't decision to disallow Coiro's participation in negotiations. Hence, while it is arguable that Kossman may have "misinterpreted" his second conversation with Wolfe, and thus acted erroneously in not sending Coiro to negotiations on March 13, 1980, clearly that denial was expressed in the first session and well before the second negotiating session. Factually, Respondent's actions clearly amounted to a denial of opportunity to Coiro to participate in negotiations and Respondent's allusions to ripeness cannot be seriously considered. Furthermore, once Respondent's position was clear, whether on March 12 or 13, it would have been futile for Kossman or Coiro to go through the motions of submitting a leave request only to have it formally denied. For the reasons set forth above, I find and conclude that Counsel for the General Counsel has met her burden of establishing that Respondent did refuse to permit Coiro to participate in the Merit Promotion Plan negotiations.

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[12] I reached this same conclusion in a recent decision involving two bargaining units represented by the same union. Department of the Navy, Naval Construction Battalion Center, Port Hueneme, California, 8-CA-566, OALJ-82-37 (Jan. 13, 1982).

[13] The Consolidated Complaint does not allege a violation of Section 7116(a)(5) based upon a denial of official time. Nor does the record establish any contractual agreement or past practice permitting non-unit employees to receive official time to engage in negotiations as a representative of the exclusive representative.

In its brief (at page 11), Respondent takes the position that in view of "deficiencies in the General Counsel's proof, Respondent does not acknowledge that the burden has shifted to it to introduce, as an affirmative defense, reasons for a refusal to bargain with the Charging Party's designated representative." Respondent then proceeds to argue that certain factors exist which would have justified its "alleged" refusal to permit Coiro to negotiate on behalf of Local 2924. In this regard Respondent asserts that there was a past practice of cross-representation by the two unions, which it attempted to adhere to in this case. Thus, Wolfe testified that whenever an employee is represented in a grievance proceeding by the opposing union rather than his or her exclusive representative, the opposing union must obtain the permission of the exclusive representative. As correctly noted in the General Counsel's brief (at page 9) the cited example is not analogous and, in addition, does not involve contract negotiations.

Respondent's reliance on this so-called history of cross-representation provides a basis for its further argument that in contacting Bales for his "permission," Wolfe was attempting to maintain "neutrality." Wolfe's concept of neutrality is rather strange. He seemed to feel that acquiescence in AFGE Local 2924's request was not being neutral, but acquiescence in NFFE's request was being neutral. It seems rather clear to me that before Wolfe even called Bales, he had decided that his definition of neutrality meant not having to bargain with Coiro (Tr. 36).[14] In any event, Respondent clearly departed from its asserted position of neutrality when it wrote the March 12 letter adopting the position that NFFE was within its rights to deny "permission" for Coiro to attend the negotiations. Clearly, since an exclusive representative has the right to select its own negotiators, NFFE really had no voice in the matter anyway. The Respondent, as the employing entity, is the agency which really denied permission, not NFFE.

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[14] Wolfe seemed to be influenced not so much by the fact that Coiro was a non-unit employee (the reason for denying official time) but, rather, because Coiro was an employee from a unit represented by a different union. Thus, it is not clear whether Wolfe's position would have been different had Coiro belonged to a unit also represented by AFGE, Local 2924.

Respondent also seems to be engaging in sheer speculation when it contends that sitting down to a bargaining table with Coiro would have given AFGE Local 2924 a propoganda advantage in their anticipated election campaign to raid a NFFE unit. Conversely, Respondent seems unaffected by any possible propoganda advantage NFFE might utilize as a result of its having dictated to management its veto of Coiro. Indeed, as noted in General Counsel's brief, Respondent's solicitousness for NFFE belies its asserted neutrality and borders on a violation of Section 7116(a)(3).

The General Counsel contends, and I agree, that the Respondent's commission of an unfair labor practice is clear. By denying Local 2924 the right to use Coiro as a negotiator. Respondent violated Section 7116(a)(1) because it interfered with the right of Coiro to participate as a negotiator, and interfered in the internal affairs of Local 2924 by refusing to accept Coiro as the union's designated representative. Such conduct is tantamount to refusing to meet and negotiate with Local 2924 itself, and therefore Respondent also violated Section 7116(a)(5).[15]

D. Whether Respondent refused to approve the selection of Coiro as Local 2924's representative on the EEO Committee. If so, did Respondent thereby violate Section 7116(a)(5) and (1)?

There is no dispute, and I find, that Respondent rescinded its approval of Coiro as a member of the EEO Committee after his attendance at only one committee meeting. The reason given by Respondent was that Coiro was not an employee of Local 2924's unit. Review of the evidence discloses no contractual limitation on the union's right to select its own representative to the Committee. Review of the Statute reveals no statutory prohibition on the right of an exclusive representative to utilize the services of non-bargaining unit employees to represent the exclusive representative in negotiations arising under Section 7131(a) or other matters arising under Section 7131(d).[16]

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[15] American Federation of Government Employees, AFL-CIO, 4 FLRA No. 39; Utah Army National Guard, 8 A/SLMR 69; Internal Revenue Service, Omaha District Office, 4 A/SLMR 493; Veteran's Administration, Temple, Texas, 2 FLRA No. 919.

[16] While it is my view that the word "employee" in Section 7131(a) and (d) means bargaining unit employees (for purposes of official time entitlement), this does not mean that exclusive representatives are statutorily precluded from utilizing the services of non-bargaining unit employees (on approved leave if they are federal employees), nor does it mean that official time for such non-unit employees cannot be negotiated at the agency's election.

My interpretation of Article 23, Sections 1 and 2 of the Memorandum of Agreement is that the union has the right to designate its representative and alternative to the EEO Committee and that the agency has no discretion but to appoint whomever is designated by the Union. The phrase "will appoint" is mandatory and not discretionary. I perceive nothing in this contractual obligation of Respondent which makes the union's designation subject to Respondent's approval. Nor do I see any limitation on the union's power of appointment which requires the union only to appoint unit employees to the Committee.[17] If this were a requirement, it would seem that NFFE, which represents two units, would be entitled to two representatives, one from each of its units. In any event, it would also seem that such requirement would be set forth explicitly in the agreement, but it is not.

Respondent's defense to this issue is no different from that set forth above in connection with the discussion of Coiro's designation to participate in negotiations of the Merit Promotion Plan. These defenses have been rejected. In summary, I find that Respondent interfered with Coiro's right to be a member of the EEO Committee and interfered with Local 2924's right to designate its own representative to the Committee, and by so doing, violated Section 7116(a)(1). Essentially such conduct is tantamount to a refusal to meet with the exclusive representative's chosen designee for the EEO Committee and, therefore, is also a violation of Section 7116(a)(5).[18]

Remedy

Having concluded that Respondent violated Section 7116(a)(5) and (1) of the Statute, I recommend that Respondent be ordered to cease and desist from such conduct, to take specific affirmative actions as set forth below, designed to effectuate the purpose and policies of the Statute. Having concluded that Respondent did not fail to comply with Section 7131(a) in violation of Section 7116(a)(8) and (1), this allegation of the Consolidated Complaint is hereby dismissed.

ORDER

Pursuant to 5 U.S.C. §7118(a)(7) and Section 2423.26 of the Final Rules and Regulations of the Federal Labor Relations Authority, U.S. Fed. Reg. 3482, 3510 (1980), it is hereby ordered that Davis-Monthan Air Force Base, Tucson, Arizona, shall:

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[17] I do not have to decide in this case whether the person designated by the union to be its representative, is representing union members or unit employees, or both. (See Jt. Exhibit No. 1.)

[18] Supra, footnote 14.

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute by refusing to permit Michael T. Coiro to attend negotiations on the Merit Promotion Plan and to be a member of the Equal Opportunity Advisory Committee, or any similar Committee.

(b) Refusing to bargain in good faith with AFGE Local 2924, exclusive representative of non-supervisory wage grade employees and general schedule guards, by refusing to permit AFGE, Local 2924, to be represented by representatives of its choice in negotiations concerning the Base Merit Promotion Plan, and in meetings involving the Base Equal Employment Opportunity Advisory committee or any other similar Committee.

(c) In any like or related manner, interfering with, restraining, or coercing any employee in the exercise by the employee of any right assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action designed and found necessary to effectuate the policies of the Statute:

(a) Notify in writing AFGE, Local 2924, the exclusive representative of all non-supervisory wage grade employees and general schedule guards that Davis-Monthan Air Force Base rescinds its rejection of Michael Coiro to the Base Equal Employment Opportunity Committee, or any other similar committee.

(b) Post at its facilities at Davis-Monthan Air Force Base, Tucson, Arizona, copies of the attached notice marked "Appendix." Copies of said notice, to be furnished by the Regional Director for Region 8, after being signed by an authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 8, in writing, within 30 days from the date of this order, what steps it has taken to comply herewith.

Francis E Dowd

FRANCIS E. DOWD
Administrative Law Judge

Dated: January 22, 1982
Washington, D.C.

[8-CA-432, 8-CA-671]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain, or coerce any employee in the exercise by the employee of any right assured by the Federal Service Labor-Management Relations Statute by refusing to permit Michael T. Coiro to attend negotiations on the Base Merit Promotion Plan, and meetings of the Base Equal Opportunity Committees, or any similar Committee.

WE WILL NOT refuse to bargain in good faith with AFGE Local 2924, the exclusive representative of all non-supervisory wage grade employees and general schedule guards by refusing to permit it to be represented by representatives of its choice in negotiations concerning the Base Merit Promotion Plan, and in meetings involving the Base Equal Employment Opportunity Advisory Committee or any other similar committee.

WE WILL, upon request, recognize the representative designated by AFGE, Local 2924, to act as its representative on the Base Equal Employment Advisory Committee or any other similar committee.

____
(Agency or Activity)

Dated: ______________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region VIII, whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, California, 90071, and whose telephone number is: (213) 688-3805.

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Labor Relations
Authority**

Washington, D.C. 20424

Number 8

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

April 23, 1982

UNFAIR LABOR PRACTICE CASES

5-CA-877 (April 15, 1982)

United States Department of the Treasury, Internal Revenue Service, Chicago, Illinois and National Treasury Employees Union, and National Treasury Employees Union, Chapter 10

3-CA-1585 (April 15, 1982)

Department of Defense Dependents Schools and Overseas Education Association

3-CA-1619 (April 22, 1982)

Department of Defense Dependents Schools and Overseas Education Association

7-CA-849 (April 22, 1982)

Internal Revenue Service, Ogden Service Center and National Treasury Employees Union

7-CA-1050 and 7-CA-1051 (April 22, 1982)

Army and Air Force Exchange Service (AAFES), Ft. Carson, Colorado and American Federation of Government Employees, AFL-CIO, Local 1345

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* THIS REPORT SERIES INCLUDES DECISIONS AND ORDERS OF FLRA ADMINSITRATIVE LAW JUDGES TO WHICH NO EXCEPTIONS WERE FILED WITH THE AUTHORITY WITHIN THE PRESCRIBED TIME LIMIT. IN ACCORDANCE WITH SECTION 2423.29(a) OF THE AUTHORITY'S RULES AND REGULATIONS, AS AMENDED (46 FED. REG. 40674 (1981)), THE FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS IN SUCH ALJ DECISIONS CONSTITUTE, WITHOUT PRECEDENTIAL SIGNIFICANCE, FINDINGS, CONCLUSIONS, DECISIONS AND ORDERS OF THE AUTHORITY.

Y3. F 31/21-3:

[5-CA-877]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF THE
TREASURY, INTERNAL REVENUE SERVICE,
CHICAGO, ILLINOIS

(Respondent)

and

Case No. 5-CA-877

NATIONAL TREASURY EMPLOYEES UNION, AND
NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 10

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on November 10, 1981, finding that the Respondent had not engaged in any unfair labor practice as alleged in the complaint, and recommending that the complaint be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (46 Fed. Reg. 40674 (1981)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., April 15, 1982

James J. Shepard

James J. Shepard, Executive Director

[5-CA-877]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

UNITED STATES DEPARTMENT OF THE
TREASURY, INTERNAL REVENUE SERVICE,
CHICAGO, ILLINOIS

Respondent

and

NATIONAL TREASURY EMPLOYEES UNION, AND
NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 10

Charging Party

. . . .

Case No. 5-CA-877

James M. Gecker, Esquire
Dennis J. Fox, Esquire
On Brief
For the Respondent

Claire R. Morrison, Esquire
Gregory A. Miska, Esquire
For the General Counsel

Richard Edelman, Esquire
By Brief
For the Charging Party

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101, et seq.[1/], and the Final Rules and Regulations issued thereunder, 5 C.F.R. §2423.1, et seq., was initiated by a charge filed on January 2, 1981 (G.C. Exh. 1(a)) alleging violations of §§16(a)(1), (2) and (4) of the Statute; and an amended charge filed on March 3, 1981 (G.C. Exh. 1(c)), alleging a violation of §16(a)(1) of the Statute. The Complaint and Notice of Hearing issued on March 6, 1981 (G.C. Exh. 1(e)), pursuant to which a hearing was duly held before the undersigned on May 19, 1981, in Chicago, Illinois.

The parties were represented by counsel, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issue involved, and were afforded opportunity to present oral argument, which right was waived by each party. At the close of the hearing, June 19, 1981, was fixed as the date for mailing post-hearing briefs, which time was subsequently extended, upon timely motion of Respondent, not opposed by counsel for General Counsel or for the Charging Party, for good cause shown, including delay in receipt of the transcript, to July 10, 1981. Counsel for General Counsel, for Respondent, and for the Charging Party each timely mailed, or filed, an excellent brief, received on or before July 13, 1981, which have been carefully considered. Upon the basis of the entire record,[2/] including

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[1/] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, e.g., 7116(a)(1) will be referred to, simply, as "16(a)(1)."

[2/] General Counsel's Motion to Correct Transcript, unopposed by the other parties, is wholly meritorious and is granted and the record is hereby corrected as follows:

Page	Line	From	To
4	16	"offerring"	"offering"
10	8	"excusemme"	"excuse me"
23	10	"agents"	"agent"
33	14	"Callahand"	"Callahan"
34	6	"these"	"this"
90	4	"witness"	"recess"
93	7	"grievance"	"promotion"

In addition, on my own motion, I correct an obvious typographical error on page 133 as follows:

> 1.18, the first "To" following the word "has" should be deleted to read "yes, I think she has potential to be a Grade 11 ...." (See, to like effect, page 136, lines 4-6).

my observation of the witnesses and their demeanor, I make the following findings and conclusions:

The Issue

As General Counsel states, the issue in this case is a very narrow one. It is, "whether Mr. Rosario's statement, in and of itself, constituted an unfair labor practice." (G.C. Brief, p. 10). Mr. Rosario, a supervisor, in the course of a second level grievance meeting, was asked by the grievant's Union representative, Mr. Callahan, "Do you want to see her (the grievant) promoted?" to which Mr. Rosario admitted he responded, "Yes, I think she has potential to be a Grade 11, but I want her to get it in a clean procedure."

Findings

1. The Charging Party, National Treasury Employees Union (hereinafter, also, "NTEU") is the recognized exclusive representative of Respondent's employees and there is in effect a collective bargaining agreement (Res. Exh. 2). Chapter 10 is an agent of NTEU acting on its behalf at the Activity.

2. Ms. Sharon Thurmond is a Grade 9 Revenue Officer employed by the Chicago District of Respondent. She is a member and an Area Vice-President of NTEU, Chapter 10.

3. On May 9, 1980, Ms. Thurmond applied for a Revenue Officer GS-11 position under a posted job announcement. The announcement was for three positions; there were eleven eligible candidates, of whom six, not including Ms. Thurmond, were determined "Highly Qualified" (Res. Exh. 3). Ms. Thurmond was informed on June 5, 1980, that she had not been selected. (G.C. Exh. 2).

4. On June 10, 1980, Ms. Thurmond filed a grievance (G.C. Exh. 2) which was denied at the first level on June 18, 1980 (G.C. Exh. 3) and was appealed to the second level on June 21, 1980 (G.C. Exh. 4).

5. The second level grievance appeal was to the Branch Chief, Mr. Luis Rosario, and the second step grievance meeting was held by Mr. Rosario, in his office, on July 2, 1981. The meeting was attended by Ms. Thurmond and her representative, Mr. Michael Callahan, a Chapter 10 steward. The meeting lasted approximately an hour and a half (Tr. 38, 45, 81, 139). Mr. Callahan raised several objections to Respondent's failure to select Ms. Thurmond for this promotion. A principal contention of Mr. Callahan concerned the rating of "2" on the factor of "Initiative". This was the only factor on which she had received a rating below a "3", which represents satisfactory performance, and all ratings below, or above, a "3" require a narrative comment to support the rating. Mr. Callahan asserted that the narrative statement by Mr.

McKinney, Ms. Thurmond's immediate supervisor, was vague and non-specific; and, in addition, produced certain forms which indicated good performance in the area of initiative by Ms. Thurmond in May, 1980, shortly after the April 16, 1980, evaluation. On the basis of these arguments, Mr. Rosario agreed to have Ms. Thurmond's rating on "Initiative" increased from a "2" to a "3". Ms. Callahan further asserted that Ms. Thurmond's file improperly contained material more than one year old and that the ranking official failed to consider that Mr. Thurmond had some Grade 11 work in her inventory. Mr. Rosario further agreed to instruct the ranking official, Ms. Francis Fletcher, to re-rank Ms. Thurmond; to disregard all material more than one year old; to give consideration to Ms. Thurmond's work on Grade 11 cases; and, in the event the re-ranking placed Ms. Thurmond on the best qualified list, she would be given "priority consideration" for the next available vacancy.

6. There is no dispute that Mr. Rosario called Ms. Fletcher to the meeting and, as he had agreed, instructed her to re-rank Ms. Thurmond after raising the "2" on "Initiative" to a "3", to disregard all material more than one year old, and to consider the Grade 11 work in Ms. Thurmond's inventory; or that Ms. Fletcher did re-rank Ms. Thurmond; but that, although her score was higher, she did not receive sufficient points (35) to qualify for "Highly Qualified" (Res. Exh. 6) nor, necessarily, for "Best Qualified", even though, in this instance, all applicants rated "Highly Qualified" were also rated "Best Qualified".

7. Although there is some question whether Mr. Rosario's "clean" remark came "virtually at the end of the meeting", as Mr. Callahan stated (Tr. 58) or before Ms. Fletcher came into the meeting, as Mr. Rosario stated (Tr. 133), there is no dispute that Ms. Fletcher was not present when the statement was made nor was she advised of the statement.

8. Indeed, Mr. Callahan prepared a document (Res. Exh. 1) entitled "2nd Level Meeting Results" which stated, in part, as follows:

> "Agreed Issues
>
> It was my understanding at the conclusions of the meeting that we had agreed upon the following:
>
> (1) that the evaluation and subsequent ranking were not fair and in accordance with the Multi-District Agreement.
>
> (2) that Sharon had earned her promotion and all present; Mr. Rosario, Sharon and myself would like to see her get it.
>
> (3) that her promotion would be effected by a change in the initiative factor ... and a re-ranking by

> the ranking official. The ranking official would disregard the initiative section of the supervisors narrative and any evaluative material over twelve months old ... She would consider the fact that the initiative factor was now a "3" ... and that Sharon had been selected to routinely receive GS 11 cases in one zip code area.
>
> "Unagreed Issues
>
> Based on the above it was my understanding that there were no outstanding unagreed issues of any importance." (Res. Exh. 1).

Mr. Rosario testified that he believed that a settlement of the grievance had been reached. However, Mr. Callahan testified, notwithstanding his written statement, that the Union and grievant, while they "agreed" to accept Mr. Rosario's concession, they did not agree to the settlement of the grievance and, in fact, following the re-ranking of Ms. Thurmond, had progressed the grievance at least through the third (Res. Exh. 7) and fourth steps (Res. Exh. 8).

9. After Mr. Rosario had agreed to change Ms. Thurmond's rating on "Initiative" from a "2" to a "3", Mr. Callahan then asserted, in effect, that if that one rating factor were in error, then so must the others also be wrong and therefore the other ratings should be raised as well. Mr. Rosario declined to raise any other rating in the absence of supporting evidence and Mr. Callahan indicated he had no additional evidence (Tr. 134, 135). This prompted Mr. Callahan to ask,

> "... what are we trying to do here, do you want Sharon to receive -- to earn a Grade 11." (Tr. 133).

to which Mr. Rosario replied,

> "Yes, I think she has potential to be a Grade 11, but I want her to get it in a clean procedure." (Tr. 133).

or

> "... I indicated that I think she has potential to get a Grade 11, but I wanted her to get it in a clean procedure." (Tr. 136).

Ms. Thurmond testified that after the ranking official, Ms. Fletcher, had been brought in and told of the changes to be made, as set forth above, and had left,

> "... I believe Michael mentioned that the things that were going to be done, the changes that were going to be

> made, would not necessarily give me the promotion ... And Mr. Rosario said there was a possibility that it would not.
>
> "Michael said he would like to see me get the promotion, and he thought that I had but I had gotten cheated out of it. And Mr. Rosario said he would like to see me get it too, but clean." (Tr. 78).

or, on cross-examination:

> "And Michael said he would like to see me get it, I had earned it and he would like to see me get it. And Mr. Rosario said he would like to see me get it too, clean." (Tr. 88-89).

Mr. Callahan testified that,

> "So, to try to find out what was in his mind and where he was coming from, I asked him, What are we trying to accomplish here, do you want to see her get promoted. And he responded with, 'Yes, I would like to see her promoted, but I would like her to get it clean and not through a grievance.'" (Tr. 38) (See, also, Tr. 61).

In view of Ms. Thurmond's testimony which fully corroborates Mr. Rosario's testimony, I conclude that, as Mr. Rosario very credibly testified, he did not say "and not through a grievance", i.e., that Mr. Rosario merely said, "yes ... but I want her to get it in a clean procedure." Nevertheless, Mr. Rosario's statement was made in the course of a grievance meeting and I would attach no significance to the presence or absence of the "and not through a grievance".

CONCLUSIONS

I have no doubt or reservation whatever that any interference with the right of an employee to file and process grievances under a negotiated agreement, by any express or implied threat of adverse consequences, is inherently destructive of the right of each employee, assured by §2 of the Statute, "to form, join, or assist any labor organization ... freely and without fear of penalty or reprisal ....", and violates §16(a)(1) of the Statute, as I expressly held in United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearm, Chicago, Illinois, 5-CA-152, which conclusion was adopted by the Authority, 3 FLRA No. 116 (1980).

The question here, of course, is whether Mr. Rosario's statement in the course of the grievance meeting that, "Yes [I want to see her promoted], I think she has potential to be a Grade 11, but I want her to get it in a clean procedure", constituted an express or implied threat of adverse consequencies. General Counsel and NTEU assert that the statement infered that a promotion obtained through the grievance procedure was "in some way unclean or tainted" (G.C. Brief, p 11); or "a promotion obtained through this procedure was unclean and something less than a promotion obtained without resort to the grievance procedure." (NTEU Brief, p. 6). For the reasons set forth below, I do not find that Mr. Rosario's statement violated §16(a)(1) of the Statute.

Mr. Rosario was not asked at the time what he meant by his statement nor did he give any explanation at the grievance meeting; however, at the hearing, Mr. Rosario testified, in part, as follows:

> "A. (Continuing) The word, clean, was used in opposition, I would say -- a clean procedure -- in opposition to the fact of Callahan and myself sitting there and, on the basis of what I considered faulty logic, reach a negotiation of the ratings that were to be given in that evaluation. It was in opposition to that, I would say.
>
> "Q. Did you threaten Sharon Thurmond in any manner?
>
> "A. No, not at all.
>
> "Q. Was there any response to your statement by Mr. Callahan or Sharon Thurmond?
>
> "A. There was no response by Sharon Thurmond. There was no response from Callahan. There was a brief pause while he wrote and then I went on as to whether we had an agreement in terms of what we had already agreed before.
>
> "Q. And his response to that was what?
>
> "A. He agreed to it." (Tr. 137-138).

Wholly apart from Mr. Rosario's explanation at the hearing, I simply do not find, in the context in which the statement was made, any impropriety. Mr. Callahan had contended that Ms. Thurmond's evaluation and subsequent ranking were not fair and in accordance with the Multi-District Agreement; Mr. Rosario had agreed that Ms. Thurmond should be re-ranked and that the ranking official should, inter alia, consider the rating on the factor of "Initiative" as a "3"; disregard all material more than one year old; and give consideration to the assignment of Grade 11 work to Mr. Thurmond. To me, Mr. Rosario's response to Mr. Callahan's question, "do you want Sharon to receive -- to earn a Grade 11", "Yes, ... but I want her to get it in a clean procedure" meant, simply, that he wanted her to get the promotion in the re-ranking (clean) procedure they had agreed upon. There was absolutely nothing said, or implied, that indicated that any promotion which resulted from the re-ranking would be "tainted" in any sense. To the contrary, as Mr. Callahan stated (Tr. 57) and Mr. Rosario confirmed (Tr. 132), Mr. Rosario further agreed that if, as a result of the re-ranking, Ms. Thurmond made the best qualified list she would than be given priority consideration for the next available slot. Not only was Mr. Rosario's agreement to give priority consideration to Ms. Thurmond indicative of his unqualified desire to insure that Ms. Thurmond be promoted if, upon re-ranking, she made the best qualified list, but his agreement, and instruction to Ms. Fletcher, that consideration be given to Ms. Thurmond's routine assignment of Grade 11 cases in one zip code area was, intended to assure, as Mr. Callahan stated, that Ms. Fletcher would "evaluate the employee's potential into a ranking that was something beyond a mere transcribing of numbers." (Tr. 60).

Indeed, Mr. Callahan's written statement fully confirms the intent of the parties. His statement, in part, shows as follows:

> "(3) that her promotion would be effected by a change in the initiative factor ... and a re-ranking by the ranking official. The ranking official would disregard the initiative section of the supervisors narrative and any evaluative material over twelve months old that she may have considered in her original ranking. She would consider the fact that the initiative factor was now a "3" ... and that Sharon had been selected to routinely receive GS 11 cases in one zip code area." (Res. Exh. 1).

Mr. Rosario had declined to change other ratings given Ms. Thurmond in the absence of any evidence to justify such a change, and Mr. Callahan presented no such evidence although given the opportunity to do so. In this context, Mr. Rosario stated, when asked by Mr. Callahan if he wanted to see Ms. Thurmond promoted, "Yes, ... but I want her to get it in a clean procedure". Nothing contained in his statement indicated that anything was intended other than that Ms. Thurmond get the promotion in the new evaluation and re-ranking, as they had agreed. The word "clean" connoted, simply, a "new" evaluation and ranking, in accordance with the agreement of the parties. That this was fully understood by Mr. Callahan is amptly shown by his written summary which stated that "her promotion would be effected" by a re-ranking on the basis of their agreement.

That Mr. Rosario's "clean" procedure meant no more than that she get the promotion in a "new" (clean) evaluation is shown by the record: First, there was no response by either Mr. Callahan or by Ms. Thurmond. Second, Mr. Rosario testified that he "went on as to whether we had an agreement in terms of what we had already agreed before"; that Mr. Callahan "agreed to it"; that he (Rosario) called the ranking official, Ms. Fletcher, to the office; that he "told her what we were doing and gave her the instruction that we had agreed on"; and that "Callahan offered his copy of the promotion package to assist in the ranking". Third, Mr. Callahan's written summary, as noted above, stated, in part, "that her promotion would be effected" by the terms agreed upon for the re-ranking.

I do not find, under the circumstances, that Mr. Rosario's statement implied, or inferred, in any manner that a promotion obtained through the grievance procedure was "in some way unclean or tainted" or was "unclean and something less than a promotion obtained without resort to the grievance procedure" as urged by General Counsel and by NTEU. But even if such meaning were possible, the effect, vis-a-vis §16(a)(1), was so insubstantial and so insignificant as to be *de minimus non curat lex*, inasmuch as it is conceded that, nothwithstanding Mr. Rosario's statement, the parties agreed as to how Ms. Thurmond's promotion "would be effected"; and that Mr. Rosario gave the ranking official the instructions "that we had agreed on", indeed, that Mr. Callahan "offered his copy of the promotion package to assist in the ranking".

Having found that Respondent did not violate §16(a)(1) of the Statute as alleged in the Complaint, I recommend that the Authority issue the following:

ORDER

The Complaint in Case No. 5-CA-877 be, and the same is hereby, dismissed.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: November 10, 1981
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOLS

(Respondent)

and

Case No. 3-CA-1585

OVERSEAS EDUCATION ASSOCIATION

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on December 1, 1981, finding that the Respondent had not engaged in any unfair labor practice as alleged in the complaint, and recommending that the complaint be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (46 Fed. Reg. 40674 (1981)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., April 15, 1982

James J. Shepard

James J. Shepard, Executive Director

[3-CA-1585]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
500 C STREET, SW., SUITE 3-N-73
WASHINGTON, D.C. 20424

DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOLS

Respondent

and

OVERSEAS EDUCATION ASSOCIATION

Charging Party

Case No. 3-CA-1585

Paul Wolfe,
Scott J. Goldsmith,
Allen F. Frost,
For the Respondent

Bruce D. Rosenstein, Esq.
Louise B. Richter, Esq.
On Brief
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statment of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, *et seq.*,[1] and the Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., was initiated by a charge filed on October 28, 1980 (G.C. Exh. 1(a)), alleging violations of §§ 16(a)(1), (2), (5) and (8) of the Statute. On February 26, 1981, the Complaint herein issued alleging violations of §§ 16(a)(1) and (5) of the Statute (G.C. Exh. 1(c)). Pursuant to the Order, dated March 5, 1981, fixing the date, time and place of hearing (G.C. Exh. 1(f)), a hearing was duly held before the undersigned on April 13, 1981, in Karlsruhe, West Germany.

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[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, *e.g.*, Section 7116(a)(1) will be referred to, simply, as "16(a)(1)."

The Complaint alleges that a memorandum regarding assignment of Educational Aides to classroom teachers was implemented without deliberations with the exclusive bargaining representative in violation of Article 10 of the parties collective bargaining agreement and in violation of §§ 16(a)(1) and (5) of the Statute.

All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument. At the close of the hearing, May 13, 1981, was fixed as the date for mailing post-hearing briefs, which time was subsequently extended, upon timely motion of Respondent, joined in by General Counsel, for good cause shown, specifically, delay in the receipt of the transcript, to June 19, 1981. Each party filed a very helpful brief, received on or before June 19, 1981, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Discussion and Conclusions

This case, peculiar to schools, directly concerns Educational (Teaching) Aides (hereinafter, "Aides") who are not included in the bargaining unit represented by the Overseas Education Association (Jt. Exh. 1; Tr. 13, 57, 79). All teaching aides are temporary, part-time employees appointed for one school year and on the last day of that school year, their appointment ends and they are terminated (Tr. 48).

Under the negotiated agreement (Jt. Exh. 1), the parties have provided for "Deliberation", "A process, short of negotiations, in which Association representatives meet with Management representatives to present their thoughts, opinions, facts, views and arguments with regard to matters affecting working conditions, personnel policies and practices, and other matters of concern to teachers." (Jt. Exh. 1, Art. 5, Definitions). Article 10 of the negotiated agreement further provides, in part, that,

> "Such 'deliberation" shall not be confined strictly to personnel policies and practices and matters affecting working conditions, but shall also include any matters

> which might affect the morale of teachers . . . ." (Jt. Exh. 1, Art. 10, Section 1).

For the purpose of this decision, "Deliberation", which, clearly, the parties have agreed does not mean "negotiate" but is "A process, short of negotiations",[2] is, essentially, synonymous with the term "consult" or "consultation" as used in Section 9 of Executive Order 11491, which was in effect when the agreement was negotiated, or as used in § 13(b) of the Statute. Nevertheless, violation, or interference with, the right to engage in deliberations would be enforceable, in appropriate cases, under the unfair labor practice provisions in the same manner as violation of the right to consult, under national consultation rights, is enforceable. cf., Secretary of the Navy, Department of the Navy, Pentagon, A/SLMR No. 924, 7 A/SLMR 932 (1977), FLRC No. 77A-146, 6 FLRC 1228 (1978), 1 FLRA 103 (1979).

Prior to 1980, Department of Defense Dependents Schools, South, which includes Germany South Region (hereinafter, also "DODDS"), had employed Aides for 60 hours per pay period (30 hours per week) or for 39 hours per pay period (4 hours per day for 9 days; 3 hours for one day, per pay period). Half time Aides were employed for 30 hours per pay period. In August, 1980, Mr. Frank Moore, Staffing Specialist, prepared a draft of a new letter, to "tie things together" (Tr. 43) and to make uniform the work days of Aides as either 4 hours or 6 hours (Res. Exh. 1). Mr. Bingham, Administrative Officer agreed, except that Aides working in support of a half-time teacher would continue to work 3 hours per day. The draft memorandum, transmitted by letter dated August 14, 1980 (G.C. Exh. 2, Tr. 10), thus provided that:

> "Aides will work a tour of duty concomitant with the tour of duty of the teacher(s) supported. Aides working in support of a full-time teacher will work 6 or 4 hours a day, as determined by this office, and aides working in support of a half-time teacher will work 3 hours a day . . . ." (G.C. Exh. 2).

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[2] Here, the parties have mutually limited the meaning "deliberate." cf. Department of Health, Education and Welfare, Social Security Administration, Great Lakes Program Center, Chicago, Illinois, 2 FLRA 559 (1980); Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, A/SLMR No. 1101, 8 A/SLMR 893 (1978), where, despite the presence of the word "consult" in the master agreement, no such differentiation between "consult" and "negotiate" was shown and no waiver of the right to negotiate was found.

Although neither Respondent nor General Counsel saw fit, as strongly suggested, to introduce the prior DODDS letters, dated August 25 and December 28, 1976, the testimony of Messrs. Moore and Bingham is both credible and wholly uncontradicted that the sole change made by the draft memorandum of August 14, 1980, was that Aides who previously worked 39 hours per pay period would, in the future, work 40 hours per pay period (Tr. 52, 64).

Without deciding whether proper notice was given of the memorandum of August 14, 1980, or whether deliberations ever took place concerning the memorandum, it is obvious that there was no conceivable adverse impact on members of the bargaining unit, i.e., teachers. It must be remembered that Aides are not part of the bargaining unit, so that members of the bargaining unit have a legitimate interest only to the extent that some change impacts on their working conditions.

Indeed, it is equally obvious that OEA had no objection whatever to Aides working 40 hours per pay period, rather that 39 hours per pay period. OEA's concern was not the increase of hours of Aides from 39 hours per pay period to 40 hours per pay period; but, rather, was the number of Aides working 4 rather than 6 hours a day. The problem is that, although Paragraph 8 of the Complaint alleged that,

> "8. On or about August 14, 1980, Respondent sent to the Union a memorandum regarding assignment of Educational Aides to classroom teachers." (G.C. Exh. 1(c))

which Respondent, by its Answer, admitted (G.C. Exh. 1(e)), the memorandum of August 14, 1980, made no determination, or allocation, of the number of Aides to work 4 or 6 hours per day. Nor, necessarily, does the Complaint make any allegation whatever concerning the number of Aides to work 4 and 6 hours.

Thus, the record is clear that the memorandum of August 14, 1980, which is the sole allegation on which the Complaint is bottomed, did not affect in any manner Respondent's determination, by the issuance of manpower vouchers, of the number of Aides and the hours they can work (Tr. 63). This is precisely what Respondent did prior to the 1980-81 school year and it is what it did for the 1980-81 school year.

Mr. Bingham testified that the over-all number of Aides was increased for the 1980-81 school year, from 163 for the 1979-80 school year (19-30 hour Aides; 72-39 hour Aides; and 72-60 hour Aides) to 180 for the 1980-81 school year (9-30 hour Aides; 95-40 hour Aides; and 86-60 hour Aides) (Tr. 67). In Karlsruhe, however, the hours of kindgarten Aides were reduced (1979-80 school year 3 kindgarten Aides worked 60 hours per pay period; in the 1980-81 school year 3 kindgarten Aides worked 40 hours per pay period) although the over-all number of Aides in the Karlsruhe Elementary School and their total hours per pay period was increased for the 1980-81 school year (1979-80 school year: 3 kindgarten Aides - 60 hours, 1 kindgarten Aide 30 hours; 1 learning disability Aide 60 hours; 1980-81 school year: 3 compensatory education Aides 40 hours, 1 learning disability Aide 60 hours, 1 special education Aide 60 hours; 3 kindgarten Aides 40 hours (Tr. 69-70). Thus, Ms. Frances L. Bauman, a kindgarten Aide in Karlsruhe, in the 1978-79 school year worked 50 hours per pay period (25 hours per week); in the 1979-80 school year 60 hours per pay period (30 hours per week); and in the 1980-81 school year worked 40 hours per pay period (20 hours per week). Kindgarten, at Karlsrhue, consists of two classes, each 2 1/2 hours. Obviously, the reduction of hours of kindgarten Aides, and specifically of Ms. Bauman, for example, to four hours per day for the 1980-81 school year meant that kindgarten Aides were not available for the full kindgarten school day nor were they available to prepare projects for the students before, or after, class. This, in turn, had impact on the work of the kindgarten teachers.

Each school year, Respondent determined, based on various factors including its budget, school enrollments, and needs, the number, kind of Aides and the hours each would work. Indeed, upon termination of all Aides at the end of the 1979-80 school year, when their appointments for that school year expired, there were no Aides employed until Aides were hired for the 1980-81 school year. Beyond showing that Mr. Bingham called each school and gave them the information as to the number and kind of Aides and the hours each would work for the 1980-81 school year (Tr. 63), the record does not show when the schools were so informed, nor does the record shown when this oral advice was followed up by the issuance of manpower vouchers; however, Dr. Mossinger, Principal of the Karlsruhe Elementary School, had, necessarily received the information as to his school on or before August 25, 1980, as, on that date, he offered Ms. Bauman a contract for the 1980-81 school year for 40 hours per pay period (Tr. 17).

Although the record does not show that Respondent advised OEA of the number or kinds of Aides to be employed or the hours each would work during the 1980-81 school year, neither does the record show that Respondent had ever previously advised OEA of the number of Aides to be employed or the hours each was to work, and/or that OEA had ever requested such information, notwithstanding that, as the record shows, the number of Aides and the hours each worked had varied considerably over the years. Because the draft memorandum was dated August 14, 1980, OEA assumed, albiet erroneously, that that document constituted Respondent's determination of the number and kind of Aides to be employed, and the hours each was to work, during the 1980-81 school year. To be sure, the memorandum of August 14, 1980, did provide that Aides would "work 6 or 4 hours a day. as determined by this office . . . ."; but the record affirmatively shows that there was no change made by the memorandum of August 14, 1980, in this regard. That is, as noted above, the record shows that the only change made by the memorandum of August 14, 1980, was that Aides would either work 6 hours per day (60 hours per pay period) or 4 hours per day (40 hours per pay period) (except Aides working in support of a half-time teacher who would continue to work 3 hours per day) rather than 6 hours per day (60 hours per pay period) or 39 hours per pay period.

In any event, Mr. Ronald G. Bentz, OEA Director for Germany South, did request that the subject of the draft memorandum, by which I would infer that he intended to include the number of Aides working 4 hours per day, be "made a part of the Agenda for the September 17, 1980, Regional deliberations" (Tr. 13; G.C. Exh. 3); Respondent did add the subject to the Agenda for the September 17, 1980 Regional deliberations; but, on September 17, 1980, Mr. Bentz responded that "since it had been implemented, I felt it was inappropriate to discuss at that point." (Tr. 13). Not only did Mr. Bentz misapprehend the effect of the memorandum of August 14, 1980, but even if were assumed that, in reality, he sought deliberations about the hours Aides were to work, his request, that "I would like this item to be a part of the regional deliberations on that date [September 17, 1980]" (G.C. Exh. 3), was granted and, with opportunity to discuss the matter on September 17, 1980, Mr. Bentz declined to do so. Under the circumstances, the fact that Respondent implemented its decision as to the number and kind of Aides to be employed, and the hours each would work, by hiring Aides for the 1980-81 school year on or about August 25, 1980, did not violate §§ 16(a)(1) or (5) of the Statute for the reasons that Aides are not represented by OEA; nor was there any breach of Article 10 of the parties' negotiated agreement as Respondent made the matter an agenda item for the September 17, 1980, Regional deliberations, as OEA had requested, and OEA declined, on September 17, 1980, to discuss the matter. Were Aides represented by OEA, their employment for the new school year without notice or opportunity to discuss the impact and implementation of the decision might well have constituted a violation of §§ 16(a)(1) and (5); but, since Aides are not part of the bargaining unit, only the impact of that decision as it affected teachers was subject to Article 10. Once Respondent determined the number and kind of Aides to be employed, and the hours each was to work, for a school year, OEA was entitled, by Article 10, to meet and deliberate about such decision as it affected teachers. Had OEA requested notice of the decision as to the number of Aides to be employed, and the hours each was to work, I have no doubt or reservation that it would have been entitled to such information; but the record does not show that OEA had ever requested such notice for any school year, and clearly, OEA did not request such information prior to employment of Aides for the 1980-81 school year. Nevertheless, OEA was entitled to discuss the impact of Respondent's decision on teachers after Respondent employed Aides for the 1980-81 school year, and OEA was afforded the opportunity to do so. That Aides had been employed by September 17, 1980, was immaterial as OEA's right, pursuant to Article 10, was to discuss the effect of Respondent's decision, concerning Aides to be employed, on teachers. Its right, to deliberations, pursuant to Article 10, was neither greater nor less by virture of Respondent's employment of Aides.[3] OEA was given the opportunity for deliberations on the matter, at the time requested by OEA, and OEA declined. Certainly, General Counsel has shown no basis whatever for a violation of Article 10, as Respondent, obviously, did not refuse to deliberate the matter. Respondent's right to employ Aides, who are outside the bargaining unit, was not subject to negotiations, even as to impact and implementation, as to the Aides; but, even apart from the provisions of the agreement which provide for deliberations rather than negotiations, OEA's right to negotiate impact and implementation, in the absence of such limitation, would have been to negotiate impact and implementation of such decision as to teachers and negotiations as to impact and implementation does not mean that the decision itself, which is a *fait accompli*, is subject to negotiation under the guise of negotiations on impact and implementation. *Delaware Army and Air National Guard* and *Association of Civilian Technicians, Delaware Chapter*, Case No. 23-CA-104 (ALJ April 10, 1981).

Strictly speaking, the draft memorandum of August 14, 1980, was not implemented until on, or after, October 6, 1980, (Res. Exh. 2), well after the deliberation session of September 17, 1980, at which OEA had full opportunity, at the time it had requested, to discuss the draft memorandum but declined to do so. For the foregoing reasons, General Counsel has failed to show any conduct in violation of Sections 16(a)(1) or (5) of the Statute and, accordingly, it is recommended that the Authority issue the following:

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[3] Aides are not part of the bargaining unit and neither the draft memorandum of August 14, 1980, which changed the hours that Aides would work, from 39 hours per pay period to 40 hours per pay period, nor Respondent's decision as to the number and kind of Aides to be employed, and the hours each would work, for the 1980-81 school year was a subject for negotiations under Executive Order 11491. Nor did either the draft memorandum of August 14, 1980, or Respondent's employment of Aides for the 1980-81 school year constitute a new policy or procedure which would make applicable the provisions of Article 10, Section 5, Subsection C or Article 11, Section 3 of the negotiated agreement. Consequently, OEA's request for Regional deliberations, to which Respondent agreed, did not impose a 45 day notice prior to implementation.

ORDER

The Complaint in Case No. 3-CA-1585 be, and the same is hereby, dismissed.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: December 1, 1981
Washington, D.C.

[3-CA-1619]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOLS

(Respondent)

and

Case No. 3-CA-1619

OVERSEAS EDUCATION ASSOCIATION

(Charging Party)

ORDER

The Administrative Law Judge issued a Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in any unfair labor practice as alleged in the complaint and recommending that the complaint be dismissed.

No exception to the Administrative Law Judge's Decision and Order was filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (46 Fed. Reg. 40674 (1981)), the findings, conclusions, and recommendations of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Washington, D.C., April 22, 1982

James J. Shepard

James J. Shepard, Executive Director

[3-CA-1619]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF DEFENSE
DEPENDENTS SCHOOLS

Respondent

and

OVERSEAS EDUCATION ASSOCIATION

Charging Party

Case No.: 3-CA-1619

Mr. Paul Wolfe
Mr. Scott J. Goldsmith
Mr. Allen F. Frost
For the Respondent

Bruce D. Rosenstein, Esquire
Carolyn J. Dixon, Esquire
On Brief
For the General Counsel

Mr. Ronald G. Bentz
For the Charging Party

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101, *et seq.*,[1] and the Final Rules and Regulations issued thereunder, 5 C.F.R.

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[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, *e.g.*, Section 7116(a)(1) will be referred to, simply, as "16(a)(1)".

§2423.1, et seq., was initiated by a charge filed on October 28, 1980 (G.C. Exh. 1(a)); an amended charge was filed on February 3, 1981 (G.C. Exh. 1(c)); a Complaint issued on February 24, 1981; and on March 5, 1981, an Order issued designating the time and place of hearing, pursuant to which a hearing was duly held before the undersigned on April 13, 1981, in Karlsruhe, West Germany.

All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues involved and were afforded the opportunity to present oral argument. At the close of the hearing, May 13, 1981, was fixed as the date for mailing post-hearing briefs, which time was subsequently extended, upon timely motion of Respondent joined in by General Counsel, for good cause shown, specifically, delay in the receipt of the transcript, to June 19, 1981. Each party filed a very helpful brief, received on or before June 19, 1981, which have been carefully considered. Upon the basis of the entire record,[2] including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

The Issue

The issue in this case is whether Respondent breached the collective bargaining agreement by refusing to deliberate the impact of the opening of a new school on the teachers represented by the Overseas Education Association (hereinafter, also, "OEA") at the old, and continuing, school.

Prior to the 1980-81 school year, elementary school students from the Germersheim area had been bussed, approximately sixteen miles, to the Karlsruhe Elementary School. Beginning with the 1980-81 school year, a new elementary school for the Germersheim area was opened at Ruelzheim (hereinafter for clarity, the school is referred to as the "Germersheim" school, although, in reality, it is located in the village of Ruelzheim, inasmuch as the parties have referred to it variously as the Ruelzheim school or as the Germersheim school and the Complaint refers to it as the Germersheim school). It was agreed by all parties that at the time the Germersheim school was opened: a) OEA did not represent any teachers at the Germersheim school; and b) that there was pending a valid question of representation. Consequently, no question concerning deliberation of the decision to open the Germersheim school is before me, as distinguished from deliberation of the impact of the opening of the school on teachers at Karlsruhe, notwithstanding General Counsel statement of the Issues in his Brief (G.C. Brief, p. 1) or at the hearing (Tr. 85), since it is clear that General Counsel's position is, as stated in Paragraph 13 of the Complaint, that Respondent failed and refused to deliberate "with the Union over the effects of the opening of the new elementary school at Germersheim, W. Germany" (G.C. Exh. 1(f); that "there was am impact on the working conditions at Karlsruhe" (Tr. 49); that, "I an not concerned with the new school: (Tr. 52); and that "Respondent violated Section 7116(a)(1) and (5) . . . by refusing to deliberate the impact. . . ." (G.C. Brief, p. 6).

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[2] Pursuant to the stipulation of the parties, the record in this case also includes the following Exhibits or testimony in Case No. 3-CA-1585:

a) Joint Exhibit 1, Case No. 3-CA-1585 (Negotiated Agreement between the Overseas Education Association and Department of Defense Dependent Schools, approved March 4, 1977);

b) Testimony of Mr. Mervin Scott, Personnel Director DODDS, transcript, Case No. 3-CA-1585, pages 29-42;

c) Background experience of Mr. Allen F. Frost, Chief, Labor-Management Relations, DODDS South, transcript, Case No. 3-CA-1585, p. 56.

As set forth in more detail in Case No. 3-CA-1585, "'Deliberation' which, clearly, the parties have agreed does not mean 'negotiate' but is 'A process, short of negotiations' is, essentially, synonymous with the term 'consult' or 'consultation' as used in Section 9 of Executive Order 11491, which was in effect when the agreement was negotiated, or as used in §13(b) of the Statute." Article 10, Section 1 further provides, in part, as follows:

> ". . . Every reasonable effort shall be made to find resolution at the lowest possible level. Items which remain unresolved may be advanced to the next higher level for further considerations." (Jt. Exh. 1)

Section 2 of Article 10 provides, in part, as follows:

> "Section 2. School Level Deliberations. The Principal and Faculty Representative Spokesperson shall meet and deliberate at the reasonable request of either party as often as circumstances require. . . ." (Jt. Exh. 1)

Findings and Discussion

1. Ms. Barbara Rudometkin, prior to the 1980-81 school year, had been a fifth grade teacher at Karlsruhe Elementary School (hereinafter, "Karlsruhe") and for five or six years was the elected Faculty Representative Spokesperson (FRS) for Karlsruhe. At the spring, 1980, election for FRS there were two other candidates and Ms. Rudometkin did not seek re-

election. Ms. Gwen Morton was elected FRS but, shortly after her election, she resigned in early May, 1980. Ms. Alice Britten was President of the local Union (Tr. 39, 84) and/or faculty representative (Tr. 38).[3]

2. When Ms. Morton resigned as FRS in May, 1980, Ms. Rudometkin acted as FRS. Whether Ms. Britten took any action with regard to Ms. Rudometkin's acting as FRS was not shown and Ms. Britten did not testify. Although it would be surprising in the extreme that no authority existed for the filling of a vacancy of FRS, I am aware that Ms. Mary Harms, librarian at Karlsruhe who was elected FRS on August 25, 1980, testified that she "didn't believe" (Tr. 84) the President had authority to fill a vacancy of FRS, but did not know whether there was any provision in the Union's constitution or by-laws to take care of emergency situations. Dr. Mossinger, Principal of Karlsruhe, believed that Ms. Rudometkin was authorized to act as FRS, following Ms. Morton's resignation and dealt with Ms. Rudometkin as FRS. Ms. Rudometkin believed she was authorized to "finish out the term [i.e., the school year]" after Ms. Morton resigned and she did so.

3. On June 16, 1980, Dr. Mossinger informed Ms. Rudometkin that the new school "is a reality, it will open next year." (Tr. 43) This was " a Monday after school had closed" (Tr. 38) and they did discuss the impact on Karlsruhe of the opening of the new school at Germersheim, including: the fact that Karlsruhe would lose about 130 students, which probably would mean about four and one-half teacher slots; that, because of the number of resignations already received at Karlsruhe, it would not affect any teachers at Karlsruhe (Tr. 72-73); that classrooms would be open at Karlsruhe which would permit their getting the teachers' lounge back and possibly permit some of the classrooms to be moved out of the basement. (Tr. 38) Dr. Mossinger believed, and assumed, that Ms. Rudometkin was the FRS as did Ms. Rudometkin, i.e., after Ms. Morton resigned as FRS in early May, 1980, Ms. Rudometkin had assumed the duties of FRS, which she had performed for five or six years, and dealt with Dr. Mossinger as the FRS. Nor is there any doubt that both did so in the utmost good faith.

4. While I have found that Dr. Mossinger informed Ms. Rudometkin in her assumed capacity as FRS that authorization for the new school had been received and their discussion of the impact on its opening on Karlsruhe was likewise in her assumed capacity, on June 16 (Tr. 56) Dr. Mossinger

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[3] Joint Exhibit 1 provided for, and defines: "Faculty Representative(s)" and "Faculty Representative Spokesperson" (Art. 5); see, also, Art. 9, Sec. 3; Art. 10, Sec. 3; but the record shows little or nothing about the structure of OEA. Although Ms. Harms identified Ms. Britten as "President" this may, or may not, be an entirely correct designation of her position.

told Ms. Rudometkin that she had an appointment for an interview for the supervisory position at Germersheim for which she was selected in the last part of July, 1980. (Tr. 57)

5. After Ms. Rudometkin had been selected for the position of Education Program Manager and teacher at Germersheim, she had further discussions with Dr. Mossinger concerning books, supplies and services and some supplies, books and materials were taken from Karlsruhe for use at Germersheim (Tr. 26) and, the nurse and learning disability teacher at Karlsruhe each made visits to Germersheim after the school opened in August, 1980.

6. In the first week of July, 1980, Mr. Ronald G. Bentz, OEA Area Director, received a copy of the TWX, dated June 19, 1980 (G.C. Exh. 2, Tr. 9) announcing approval for an elementary school near the Army Depot at Germersheim. By letter dated July 14, 1980, Mr. Bentz requested,

> ". . . immediate deliberations regarding the school environment, school size, facilities, supplies, transportation, teacher transfers, etc.
>
> "If you are unwilling or unable to deliberate this immediately, OEA wishes to request immediate negotiations." (G.C. Exh. 3)

7. By letter dated July 25, 1980, Mr. Herman D. Search, Acting Director, acknowledged Mr. Bentz' letter dated July 14 and stated, in part, as follows:

> ". . . I suggest that deliberations be held off until such time as exclusive recognition is granted. Management has every intention of conforming with the legal and contractual obligation to discuss this matter with the appropriate union representative.
>
> . . .
>
> I suggest that this would be an appropriate topic for discussion at the 17 September 1980 deliverations." (G.C. Exh. 4)

8. Mr. Bentz testified that at the September 17, 1980, deliberation session, recognition for Germersheim was brought up but Respondent declined to discuss the matter because of the pending question of recognition and ". . . it was not discussed further than that" (Tr. 16), that is, "The relationship to Karlsruhe and the impact on it." (Tr. 17) Mr. Bentz further stated, when asked if he discussed the opening of the Germersheim school as it related to the impact on the Karlsruhe school,

> "I don't recall having any such discussions with the agency." (Tr. 17)

9. By letter dated October 29, 1980, Mr. Bentz requested:

> ". . . that OEA and DODDS-S get together as soon as possible to conduct impact bargaining over the new school opened at Ruelzheim in August, 1980. Please let me know your response not latter than 1 December 1980." (G.C. Exh. 5)

10. Mr. Frost respondent to Mr. Bentz' letter of October 29 by letter dated December 1, 1980, in which he stated as follows:

> "This office is in receipt of a number of requests from you for negotiations over various issues.
>
> "To my knowledge, the negotiated agreement between the OEA and DODDS is still in full force and effect. Section 1, Article 10 of that agreement is quite specific on the meaning of deliberations and the resolution of unresolved items.
>
> "This office is ready and willing to conform to the provisions of the agreement. We are not, however, agreeable to engage in negotiations." (G.C. Exh. 6)

11. As noted above, Ms. Harms was elected FRS for Karlsruhe on August 25, 1980, and she testified that she, as FRS, in September 1980 "requested formal deliberations in September. We set up a time." (Tr. 83) Ms. Harms did not state what matters she sought, or had, deliberations and Dr. Mossinger was not asked about deliberations with Ms. Harms. Mr. Frost testified that he, as Labor Relations Specialist for Respondent, was never asked to deliberate with regard to the impact on Karlsruhe of the opening of the Germersheim school. (Tr. 76) The record shows that Ms. Britten, President of the local Union at Karlsruhe, knew that the school in Germersheim would open in August, 1980, but Ms. Rudometkin stated, ". . . we never talked about the whole impact of it." (Tr. 39)

Conclusions

A school at Germersheim had been under active consideration since at least 1977 or 1978 and was the subject of deliberation, or discussion, between FRS Rudometkin and Dr. Mossinger on numerous occasions prior to the 1979-80 school year. During the 1979-80 school year, prior to the school becoming a reality, Ms. Rudometkin and Dr. Mossinger had further discussions with regard to the impact of a new school on Karlsruhe, most of which were of a positive nature, such as: being able to have a faculty lounge; moving one or more classrooms out of the basement; elimination of bussing problem, including bus duty of teachers; resolution of the problem of contacting parents in the Germersheim area; resolution of lunch problem. However, they also discussed various options in the event, if a school were authorized at Germersheim for less than kindergarten through grade 6 and some students from the Germersheim area remained at Karlsruhe. The record is not clear whether these discussions took place, in whole or in part, prior to Ms. Morton's election as FRS, in the spring of 1980, or after Ms. Morton's resignation in early May of 1980.

Following Ms. Morton's resignation as FRS in May, 1980, Ms. Rudometkin took over in the interim and Dr. Mossinger dealt with Ms. Rudometkin as FRS. On June 16, 1980, Dr. Mossinger informed Ms. Rudometkin, as FRS, that the school in Germersheim had been approved, as requested, i.e., Kindergarten through grade 6, and they had deliberations on the impact of the new school on Karlsruhe, including: the loss of about 130 students which, depending on enrollment, would probably result in the loss of about four and one-half teacher slots at Karlsruhe; and the fact that, because of resignations already received, teachers at Karlsruhe would not be affected. Ms. Rudometkin, a member of OEA, had, since early May, acted as FRS and both she and Dr. Mossinger believed she was authorized to act as FRS, a position she had filled for five or six years prior to Ms. Morton's election in the spring of 1980. Although the record casts doubt on the authority of the local Union President to designate an interim FRS to act in an emergency, the record does not show that, in fact, Ms. Rudometkin's acting in the capacity of FRS was ultra vires. Certainly, Dr. Mossinger was entitled to rely on Ms. Rudometkin's representation that she was FRS, as she had been the FRS for several years, and he knew that Ms. Morton had resigned, and notification was given, orally, in the same manner as it was always given (see, also, Tr. 83), and she had acted on behalf of OEA from the date of Ms. Morton's resignation within the scope of her apparent authority. Nor is there any doubt whatever that she acted wholly in the interest of OEA and Karlsruhe in the deliberations of June 16, 1980. Thus, the immediate major concern to Karlsruhe was whether the opening of the new school, with the attendant loss of students and teacher slots, would affect Karlsruhe teachers and this was explored with Dr. Mossinger who explained that, because of the number of resignations already received, Karlsruhe teachers would not be affected. In addition, other aspects of the impact of the new school on Karlsruhe were discussed, including supplies and services which would have to be furnished by Karlsruhe.

I conclude, as the record shows, that deliberations of the impact of the opening of the new school on Karlsruhe were held on June 16, 1980. In addition, the local Union President, Ms. Britten, was aware, at least in July, 1980, that the school in Germersheim had been approved and that it would open for the 1980-81 school year. Although Dr. Mossinger held deliberations with Ms. Rudometkin on June 16, 1980, with regard to the impact of the new school on Karlsruhe, it is obvious that those deliberations did not, and by the very nature of the various uncertainties of actual needs could not, cover all "matters which might affect the morale of teachers" at Karlsruhe and, under the very broad scope of Article 10, Section 1 of the parties' agreement, did not foreclose further deliberations on matters of concern to teachers at Karlsruhe as they might arise. Although deliberations could have been requested as to the impact of the new school on Karlsruhe not covered by the deliberations of June 16, or the matters covered by the June 16 deliberations could have been elevated, the record fails to show that any such request was ever made. Thus, it is conceded that no matter covered by the June 16 deliberations was ever elevated to a higher level; Ms. Britten, although aware that a school at Germersheim had been approved and would open for the 1980-81 school year, did not request any deliberations; and Ms. Harms, after her election as FRS on August 25, 1980, did not request deliberations on the impact of the Germersheim school on Karlsruhe, although she did request "formal deliberations", and a date was agreed upon, on other unspecified matters.

Respondent gave notice to Mr. Bentz that a new elementary school, kindergarten through grade 6, had been approved for the Germersheim area. Mr. Bentz testified that he received the notice in the first week of July, 1980. Such notice satisfied the requirements of Article 10, Section 5, subsection C, if it were applicable. Although Mr. Bentz requested deliberations by his letter of July 14, 1980, from the face of his request it is obvious that he sought deliberations concerning Germersheim except possibly "teacher transfers" which, necessarily, also concerned Karlsruhe or, possibly, teachers located elsewhere, and that he did not, except as noted, request deliberations on the impact of the opening of Germersheim on Karlsruhe. Respondent, by its letter dated July 25, 1980, responded that deliberations "regarding school environment, school size, etc., for the new elementary school established at Germersheim . . . be held off until such time, as exclusive recognition is granted." (G.C. Exh. 4) In addition, Respondent suggested "that this would be an appropriate topic for discussion at the 17 September 1980 deliberations." (G.C. Exh. 4)

Mr. Bentz took no further action until the September 17, 1980, deliberation meeting at which time he testified that he brought up recognition for Germersheim, which Respondent declined to discuss because of the pending question of representation. Recognition for Germersheim is not before me; and Mr. Bentz made no request to deliberate the impact of the new school on Karlsruhe. Thus, Mr. Bentz testified, when asked if he discussed the impact on Karlsruhe, "I don't recall having any such discussions with the agency" (Tr. 17) and Mr. Frost, as Labor Relations Specialist for Respondent, testified that he was never asked to deliberate with regard to the impact on Karlsruhe of the opening of the Germersheim school.

By letter dated October 29, 1980, Mr. Bentz requested "impact bargaining over the new school opened at Ruelzheim in August, 1980." (G.C. Exh. 5), to which Mr. Frost responded, by letter dated December 1, 1980, that, pursuant to Article 10, Section 1 of the parties' agreement, Respondent would deliberate but would not negotiate. The record does not show that Mr. Bentz thereafter requested deliberations.

For the most part, the impact of the new school concerned only Karlsruhe and the only impact shown as to Karlsruhe involved the borrowing of some books and audio visual equipment; some visits by the school nurse, the learning disability teacher and speech therapist from Karlsruhe; and one meeting, with another scheduled, with the Child Study Committee at Karlsruhe. While impact on Karlsrhue was slight, I assume that the impact was more than de minimis; nevertheless, the record shows no refusal to deliberate at the school level. To the contrary, deliberations were held by Dr. Mossinger and Ms. Rudometkin on June 16, 1980, and the record shows no subsequent request by OEA at Karlsruhe for deliberations.

From the breadth of the parties' agreement concerning matters subject to deliberations, I assume but do not decide, contrary the position of Respondent, that Regional deliberations on the impact of the opening of Germersheim would have been appropriate, not because notice was given to Mr. Bentz but, rather, because there may have been matters of regional concern. For example, the manner of staffing, i.e., whether teachers would be permitted to transfer to Germersheim. Again, however, the record shows no refusal to deliberate at the Regional level any matter of impact of the new school on OEA's existing unit of recognition. To the contrary, Mr. Bentz requested deliberations on recognition for Germersheim and, when this was refused, because of the pending question of recognition, he made no request to deliberate impact on Karlsruhe. While Mr. Bentz did request "impact bargaining" by his letter of October 29, 1980, I find no violation, either of the parties' agreement or of Statute, since, as noted above and in Case No. 3-CA-1585, the parties have, specifically, agreed to a procedure for deliberation which "is a process, short of negotiations" and Respondent, by its letter of December 1, 1980, offered to deliberate in accordance with Article 10, Section 1 of their agreement.

Accordingly, as General Counsel has failed to show by a preponderance of the evidence that Respondent failed or refused to deliberate with OEA over the effect of the opening of the new elementary school at Germersheim, W. Germany, as alleged in the Complaint, it is recommended that the Authority issue the following:

ORDER

The Complaint in Case No. 3-CA-1619 be, and the same is hereby, dismissed.

William B Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: December 3, 1981
Washington, D.C.

[7-CA-849]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

INTERNAL REVENUE SERVICE,
OGDEN SERVICE CENTER

(Respondent)

and

Case No. 7-CA-849

NATIONAL TREASURY EMPLOYEES UNION

(Charging Party)

ORDER

The Administrative Law Judge issued a Decision and Order in the above-entitled proceeding finding that the Respondent had not engaged in any unfair labor practice as alleged in the complaint and recommending that the complaint be dismissed.

No exception to the Administrative Law Judge's Decision and Order was filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (46 Fed. Reg. 40674 (1981)), the findings, conclusions, and recommendations of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., April 22, 1982

James J. Shepard

James J. Shepard, Executive Director

[7-CA-849]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

INTERNAL REVENUE SERVICE,
OGDEN SERVICE CENTER

Respondent

and

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

Case No. 7-CA-849

Robert J. Wilson, Esquire
For the Respondent

Gavin K. Lodge, Esquire
For the General Counsel

Judy Berkowitz, Esquire
For the Charging Party

Before: GARVIN LEE OLIVER
Administrative Law Judge

Decision

Statement of the Case

This case arose pursuant to the Federal Service Labor-Management Relations Statute, 5 U.S.C. §7101 et seq. (the Statute), as a result of an unfair labor practice complaint issued by the Regional Director, Region Seven, Federal Labor Relations Authority, Kansas City, Missouri, against the Internal Revenue Service, Odgen Service Center (Respondent or Ogden Service Center), based on a charge filed by the National Treasury Employees Union (Charging Party or Union). The complaint alleged, in substance, that Respondent violated sections 7116(a)(1) and (5) of the Statute in or about August 1980 by unilaterally terminating the practice of allowing employees on the swing shift in the Adjustment Branch to play and listen through earphones to portable radios and tape players at their work stations and by refusing the Union's request to bargain over the alleged change on or about September 25, 1980. Respondent denied the allegations and asserted that there was no change in past practice; that stopping radio playing was a reaffirmation of its existing practice; and that the action was in accordance with the parties' agreement.

A hearing was held in this matter in Ogden, Utah. The Respondent, General Counsel, FLRA, and Charging Party were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. Based on the entire record herein, including my observation of the witnesses and their demeanor, the exhibits and other relevant evidence adduced at the hearing, and the briefs, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

1. Since May 11, 1973, and at all times thereafter, the Union, a labor organization, has been recognized by the Respondent as the exclusive representative of an appropriate unit of professional and non-professional employees of the Internal Revenue Service, Ogden, Utah. On August 31, 1977, the Union was certified as the exclusive bargaining representative of an appropriate unit of all professional and non-professional employees in a consolidated multi-service center unit of employees including, among others, those represented by the Union at Internal Revenue Service, Ogden, Utah. (General Counsel's Ex. 1(a), 1(b), par. 3). The Union and Respondent were parties to a multi-unit collective bargaining agreement which was in effect from October 18, 1975 until January 1981 when a new consolidated agreement took effect. (Joint Ex. 3; Tr. 46). Article 4, section 2A of the 1975 agreement provides, "The employer retains all other rights in accordance with applicable law and regulations, except for those specific modifications contained in this agreement." (Respondent's Ex. 2). After unit consolidation, changes involving more than one service center have been normally negotiated at the national level, and changes limited to one service center have been negotiated locally. (Tr. 50-51; 56-57). Negotiations for the new contract were conducted during the period August 1978 through January 1981. Proposals were submitted in June 1978, and no new proposals were authorized after that date. No proposals or policies concerning the use of radios were discussed. (Tr. 46-47, 60).

2. For several years the Ogden Service Center has provided employees background instrumental music over the public address system. IRS secures the music from the Muzak system. Employees have been told that the music is designed and regulated to increase employee productivity. (Tr. 16, 26-27, 30-31, 37, 39, 62-63).

3. During 1981 the maximum number of employees at the Ogden Service Center reached 3800. In August of 1980 the Center had 2700 employees,

307 of whom worked on the swing shift, and 40 of these employees worked on swing shift in IMF Adjustments. (Tr. 46).

4. At various times during the period 1979 to August 1980 from three to eleven employees on the swing shift in the Adjustment Branch were allowed to listen to their own battery-powered radios and tape players at their work stations, provided they listened through earphones so as not to disturb other employees. At least two of these employees considered the Muzak-system music outdated and grating on the nerves. They listened instead to their own taped music or to radio station music. The use of radios by these employees was not constant. Some of the employees listened for greater periods of time than others. The use of radios by a number of these employees was allowed at various times over the period by three different supervisors on the swing shift. One was an acting supervisor, Jerry Kennedy, acting supervisor of a temporary "collapsible" unit. Units of this type generally exist for a short period of time, usually during a tax filing season. Approximately nine employees in his unit may have used radios for an unspecified period of time prior to August 1980. The use of radios under another supervisor, Sally Lambert, involved approximately three employees. The use of radios under another swing shift supervisor, Joan Garcia, also involved approximately three employees, except that three or four more employees listened to radios during the 1979 world series. No more than three employees of the forty on the swing shift were shown to be using personal listening devices in August 1980.

5. In July 1980 a number of swing shift employees in another branch, the Data Conversion and Accounting Branch, asked their supervisor whether they, too, could listen to personal radios with earphones. Upon being told they could not, they requested assistance from the Union steward on the swing shift, Ms. Gayla Hansen.

6. Ms. Hansen had no prior knowledge of employees in the Adjustment Branch listening to personal radios. (Tr. 35-36). In the course of her inquiries regarding the use of radios Ms. Hansen contacted Sally Lambert, one of the swing shift supervisors in the Adjustment Branch. Ms. Lambert confirmed that radios with earphones had been used by employees in her unit for about two years without any problems. Ms. Lambert said that it had been cleared with Employee-Management Relations. (Tr. 37, 42). Ms. Hansen thereupon contacted Irv Thurston in Employee-Management Relations. (Tr. 37). Mr. Thurston responded to Ms. Hansen's inquiries by memorandum of July 15, 1980, which stated, in part, as follows:

> I can find no written service center policy on your question of radios at work stations, but it is definitely discouraged. GSA does not normally allow any personal energy consuming devices in the center.
>
> As there is no written policy there may have

> been incidents where radios have been allowed in the past, but it would be a situation where management has had the approval of the director. I suggest if you have a particular request that you make the immediate supervisor aware of it and let management respond based on the individual circumstances. (General Counsel's Ex. 2).

7. Ms. Hansen contacted the Data Conversion section chief, Beulah Shupe, and asked if it would be permissible for employees in the branch to listen to personal radios with earphones. The section chief informed her that "there was a branch policy against the use and that they could not use them, that productivity would probably interfere." She also remarked that there were no vocalists on the music provided by the public address system. (Tr. 37). Ms. Hansen also spoke with the branch chief of the Data Conversion and Accounting Branch, Marge Worthen. Ms. Worthen stated that there was an unwritten policy against the use of radios; that productivity would probably deteriorate if personal radios were used because of the choice of music; and that the background music already provided was regulated for better productivity. (Tr. 39).

8. In early August 1980 the Director of the Center received an unsigned letter to "Dear Lets Level," a column for employee comments and inquiries in the local service center newspaper. The letter referred to the use of radios in the Adjustment Branch and asked for permission to use them in Data Conversion. (Respondent's Ex. 1). The Director asked subordinates if the matter were true. He was advised that two employees in Adjustments were using radios. The Director directed his subordinates to have the practice stopped. (Tr. 44-45). Accordingly, swing shift employees in the Adjustment Branch, who had been listening to personal radios, were told to discontinue their use. (Tr. 29).

9. Two employees in the Adjustment Branch went to see Branch Chief Bevan Higby after they were informed that radios could not be used. The Branch Chief stated that it was not, and had never been, a policy at IRS to use radios; that it was just a small group listening to radios; and, as other areas of the Center were complaining, they were going to stop it before it got out of hand; that the IRS used the Muzak system because it had been tested and proven effective. (Tr. 30-31).

10. On August 21, 1980, the Union wrote the Director requesting to negotiate on the substance, impact and implementation of the change regarding the use of radios in the Adjustment's swing shift. (Joint Ex. 1). On September 25, 1980 the Director wrote the Union denying that a substantive change was made or that management was obligated to bargain on the change. (Joint Ex. 2).

11. The Ogden Service Center Director, Dominic E. Pecorella, testified that during the period he was Assistant District Director

(May 1976 through January 1980) and since he has been the Director (January 1980) the unwritten policy has been that employees are not to play their personal radios; that he knew about the policy because there were no radios; and that, instead, IRS has provided employees with background music through the Muzak system. (Tr. 44; 52-53).

Discussion, Conclusions, and Recommendation

The General Counsel and the Charging Party assert that the practice on the swing shift in the Adjustment Branch of employees listening through earphones to private, battery-powered radios and tape players ripened into a condition of employment by August 1980 which could not be unilaterally changed by management; that the Union did not waive the right to negotiate the use of radios; and that a remedy reinstating this practice for the Adjustment Branch swing shift is required to effectuate the policies of the Statute.

Respondent contends that the General Counsel has not sustained his burden of proof in showing a past practice, as the practice was not shown to be unequivocal, clearly enunciated, of significant duration, and jointly accepted and acted upon; that there was no change in working conditions, but merely a reaffirmation of existing policy; that, even if there was a change, it was not substantial, did not affect general working conditions, and the Union has waived its right to bargain over policy changes that affect less than the entire center.

It is well established that parties may establish terms and conditions of employment by practice, or other form of tacit or informal agreement, and that this, like other established terms and conditions of employment may not be altered by either party in the absence of agreement or impasse following good faith bargaining. Department of the Navy, Naval Underwater Systems Center, Newport Naval Base, 3 FLRA No. 64 (1980). Past practices generally include all conditions of employment not specifically covered in the parties' collective bargaining agreement which are followed by both parties, or followed by one party and not challenged by the other party over a period of time. Past practices may also include the actual practice being followed, regardless of the contractual agreement. In order to constitute the establishment by practice of a term and condition of employment the practice must be consistently exercised for an extended period of time with Respondent's knowledge and consent. Internal Revenue Service and Brookhaven Service Center, 6 FLRA No. 127 (1981).

I agree with Respondent's position that the General Counsel has not proved by a preponderance of the evidence that the listening by certain employees through earphones to their personal battery-powered radios or tape players became by practice an established term and condition of employment on the swing shift in the Adjustment Branch. There are forty employees on the swing shift in the Adjustment Branch. The record shows that three different supervisors on the shift allowed a total of about eleven employees to listen to such devices at various times and for various periods over a nearly two year period. One of these supervisors, under whom up to nine employees may have used radios, was an acting supervisor of a temporary unit, presumably for only a short period of time, generally a filing season. As for the other two supervisors, only three employees under each of the supervisor were specifically identified as having listened to such devices. Only three employees were shown to be using such devices when the practice was stopped. Thus, the record does not show that the practice was clearly enunciated or widespread. The record demonstrates that the use of such devices varied considerably, suggesting that use could have been based as much on luck as on design.

The Union, including the swing shift steward, was not even aware that employees in the Adjustment Branch were using radios until the instant dispute came to the Union's attention. The record clearly shows that other sections and branches forbid the playing of radios. Although one of the supervisor's in the Adjustment Branch told the Union that the practice in Adjustments had been cleared with Employee-Management Relations, there was no definite showing that the practice had been approved by management. Employee-Management Relations informed the Union that "it is definitely discouraged" and that any instance where radios have been allowed "would be a situation where management has had the approval of the director." The Adjustment Branch chief subsequently informed employees that it was not, and had never been, a policy in the Branch to use radios, and the current director credibly testified that there has been an unwritten policy against radios at least since 1976 due to the fact that specific background music has been provided for employees through the Muzak system. I conclude that a preponderance of the evidence does not establish Respondent's implied knowledge and consent to such a practice through mutual acceptance and action.

It is concluded that Respondent's action in August 1980 prohibiting employees on the swing shift in the Adjustment Branch from listening to portable radios and tape players was not a change in conditions of employment, but was, instead, a reaffirmation of existing policy against employees listening to personal devices, which action was taken to ensure uniformity of enforcement among all of Respondent's subordinate supervisors and employees.*/ Cf. Department of Health, Education and Welfare, Region V, Chicago, Illinois, 4 FLRA No. 98 (1980); Department of the Treasury, Internal Revenue Service, Cleveland, Ohio, 6 FLRA No. 40 (1981).

Having concluded that a preponderance of evidence does not establish that Respondent violated the Statute in the manner alleged, it is recommended that the Authority issue the following Order:

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*/ Having reached this disposition, it is unnecessary to consider Respondent's additional defenses.

Order

It is hereby Ordered that the complaint in Case No. 7-CA-849 be, and it hereby is, DISMISSED.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: December 3, 1981
Washington, D.C.

[7-CA-1050, 7-CA-1051]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

ARMY AND AIR FORCE EXCHANGE
SERVICE (AAFES)
FT. CARSON, COLORADO

(Respondent)

and

Case No. 7-CA-1050
7-CA-1051

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1345

(Charging Party)

ORDER

The Administrative Law Judge issued a Decision and Order in the above-entitled consolidated case concluding, in part, that the Respondent had engaged in certain unfair labor practices alleged in the complaint and recommending that the Authority order the Respondent to cease and desist therefrom and also to take certain affirmative action. The Administrative Law Judge further found that the Respondent had not engaged in other unfair labor practices alleged in the complaint, and recommended that as to those allegations, the complaint be dismissed.

No exception to the Administrative Law Judge's Decision and Order was filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's rules and regualtions, as amended (46 Fed. Reg. 40674 (1981)), the findings, conclusions, and recommendations of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations found by the Administrative Law Judge and take the affirmative action set forth in the Order. As to all other allegations contained therein, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., April 22, 1982

James J. Shepard

James J. Shepard, Executive Direcotor

[7-CA-1050, 7-CA-1051]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

ARMY AND AIR FORCE EXCHANGE
SERVICE (AAFES)
FT. CARSON, COLORADO

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1345

Charging Party

. . . .

Case Nos. 7-CA-1050
7-CA-1051

Luther G. Jones, III, Esq.
For the Respondent

Kenneth Bull
For the Charging Party

John J. Rubin, Esq.
For the General Counsel

Before: ALAN W. HEIFETZ
Administrative Law Judge

DECISION

Statement of the Case

This proceeding arose pursuant to the Federal Service Labor-Management Relations Statute, 5 U.S.C. §7101, et seq., as a result of unfair labor practice charges filed March 9, 1981, with the Federal Labor Relations Authority. Consequently, on May 29, 1981, the Regional Director issued an order consolidating these cases and a complaint alleging (1) that the Army and Air Force Exchange Service (AAFES), Ft. Carson, Colorado, in violation of Sections 7116(a)(1), (5) and (8) of the Statute, conducted formal discussions with bargaining unit employees concerning personnel policies, practices and other general conditions of employment without affording the American Federation of Government Employees, AFL-CIO, Local 1345 (the Union) an opportunity to be represented at those discussions which were held in the latter part of May 1980, and also on or about November 13, 1980; and (2) that in violation of Section 7116(a)(1) of the Statute, on or about November 13, 1980, Respondent, through its agents, told bargaining unit employees that the agent could not speak freely if the Union were present at a meeting with the employees, that the Union sometimes hurt more than it helped, and that a certain Union official was not for the people. Respondent admits the allegations concerning the discussion which took place in the latter part of May 1980, but denies all other allegations.[1]

A hearing was held on September 3, 1980, in Denver, Colorado. All parties were afforded full opportunity to examine witnesses, to introduce evidence, to make oral argument and to file briefs. Upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommended order:

Findings of Fact

On May 19, 1980, Daniel Wade, the store manager at Respondent's Main Exchange, appeared at the Exchange Service's Toyland store. As alleged in the Complaint and admitted at the hearing by Respondent, Mr. Wade entered the employee break room and,

> ...conducted a formal discussion with bargaining unit employees concerning the administrative transfer of the Toyland Operation to the Main Store Operation, the eventual closure of the Toyland Operation, and other personnel policies, practices and other general conditions of employment, as described in 5 U.S.C. 7114(a)(2)(A), without affording the Union an opportunity to be represented at said discussion.

During the course of this discussion, one employee asked where Laura VanHorn[2] would be working after Toyland closed. This question was prompted by rumors that, because of regulations concerning nepotism, Laura might be prevented from working at the Main Exchange where Ray VanHorn, whom she would wed in July, was already working. The nepotism issue was first raised more than a month earlier by Beatrice Smith, now

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[1] The admission was made at the hearing notwithstanding that the allegations concerning the May 1980 discussion were denied in Respondent's answer to the complaint.

[2] Laura VanHorn's maiden name is not a matter of record.

Department supervisor but then, a Union steward.[3/] On both occasions, Mr. Wade's response was that the question would be resolved after the marriage took place.

Laura and Ray Van Horn were married on July 3, 1980. At the time, he was working in the Main Exchange, but on November 1, he was transferred to the food warehouse. Shortly after the marriage, Toyland closed and she became the temporary supervisor at the Butts Field Annex until January 1981 when she became an operations clerk at the Main Exchange.

The VanHorns were not pleased to be working at different locations. Shortly after his November 1 transfer to the food warehouse, Ray VanHorn talked to Union Vice-President, Marlene Moosman. He told her that he had heard that the Union was trying to split them up.[4/] Ms. Moosman denied that and said that according to her interpretation of the nepotism regulation, it was proper for the two of them to work together as long as they were not under one another's direct supervision. Since this interpretation differed from that given his wife by Mr. Wade, Ray VanHorn called Mr. Wade to set up a meeting for Friday, November 14, to discuss the nepotism question. Those who were to be present were the VanHorns, Ms. Moosman and Mr. Wade. That meeting, however, never took place.

On Thursday, November 13, Mr. Wade called Laura VanHorn and, during a work related conversation, asked if the VanHorns would be willing to meet with him without the Union present. He said that he would be able to speak more freely about the matter without the Union present.[5/] The VanHorns agreed to such a meeting because they "felt that if the matter couldn't be discussed openly, there was no sense of having a meeting..." They met that afternoon for about an hour in Mr. Wade's office with Mr. Wade and Ms. Smith. They discussed the nepotism regulation and how it would apply to them and to other employees.

[3/] Ms. Smith told Mr. Wade that Laura and Ray "were together" and that this constituted "them working together". There is no evidence that this information and opinion was conveyed in her capacity as a Union steward rather than as an individual.

[4/] Although he was not asked how he had heard of the Union's alleged action, the evidence shows that the nepotism question was first raised by Beatrice Smith at a time she was a Union steward. See footnote 3.

[5/] Although Mr. Wade denied making this statement on the phone, I credit Laura VanHorn's testimony to the contrary. If he hadn't made this statement on the phone, there would have been no reason for the VanHorns to agree to this meeting without the Union.

During the course of this meeting, it was made clear to the VanHorns that management's interpretation of the nepotism regulation prohibited them from working together. Ray VanHorn then informed Mr. Wade and Ms. Smith that in view of the conversation that he had had with Marlene Moosman, it was clear that the Union's interpretation of that regulation was different from management's. At that point, Ms. Smith said, "Marlene is not for the people" and Mr. Wade said, "The Union often hurts more than it helps."[6] Shortly after this meeting, Mrs. VanHorn cancelled the meeting which was to include Ms. Moosman and to be held on the fourteenth of November.

Discussion and Conclusions

Section 7114(a)(2)(A) of the Statute provides that the Union must be given the opportunity to be represented at:

> any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general conditions of employment....

There is no dispute that the meeting of May 19, 1980, fell within the ambit of this section and that failure to afford the Union an opportunity to be represented at that discussion constituted an unfair labor practice. However, with respect to the meeting of November 13, 1980, Respondent argues that it did not have the indicia of a "formal" discussion and that it concerned only a matter personal to the VanHorns, not a "general" condition of employment. Thus, Respondent argues that the meeting was not within the purview of Section 7114(a)(2)(A). That argument must be rejected.

Granted that the meeting to be held on the 14th was called for by Ray VanHorn and that, at the actual meeting which took place on the 13th, no formal notes or other record was made of the discussion, numerous

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6/ Although both management representatives deny making these statements, I credit the testimony of the VanHorns. Mr. Wade's denial was equivocal and his testimony indicates a less than reliable memory of critical events. Ms. Smith is the individual who raised the nepotism question in the first place during a time when she was a Union official, but acting in an individual capacity. It is obvious that her personal view of the regulation did not square with the Union's position as explained by Ms. Moosman. The relationship between Ms. Smith and Ms. Moosman was strained and casts a cloud over the objectivity of her present recollection of what was said during the meeting.

factors compel the conclusion that the meeting was "formal" within the meaning of the Statute: (1) the meeting was prearranged and not spur-of-the-moment; (2) it was set a day earlier than scheduled at Mr. Wade's instance; (3) it involved the Store Manager and the Department Supervisor, fairly high-level officials; (4) the situs was in the official's office; (5) it involved the interpretation of an agency regulation; (6) management was prepared and did enter into a discussion of the regulation; (7) the meeting was of sufficient duration to allow for a discussion of the agency regulation; (8) as more fully discussed below, the matter had ramifications for all unit employees and was not integrally related to the formal grievance process; (9) the discussion was more than a mere counselling session involving an individual employee's conduct; (10) the discussion was not merely shop-talk concerning day-to-day operations of the unit; and (11) there was debate over the regulation and not merely an announcement of policy.

There is also no doubt that the personnel policy discussed at the meeting was not a purely personal matter. It cannot be gainsaid that the application of the policy to these particular individuals was uppermost in their minds. However, it is also clear that the interpretation of the policy that would be applied to their particular situation would have general applicability to all similarly situated persons in the unit or to all those who might in the future be so situated. There is no evidence of record which would indicate that their conjugal relationship is of such a unique character that application of the nepotism regulation to their marriage would be any different from the way it would be applied to any other.

Respondent argues that the statement by Mr. Wade, that he could not speak freely if the Union were present, does not constitute a violation of the Statute because (1) it was made to a supervisor and (2) the statement did not tend to "interfere with, restrain or coerce" because it was cured by a subsequent and prompt reversal of that position. The first argument fails because, although the statement was made over the phone to Laura VanHorn who was, at the time, a temporary supervisor, it was also directed to her husband who was not a supervisor but who was a member of the unit. The fact that the message was relayed to Ray VanHorn through his wife and not spoken directly to him is of no moment. The second argument fails simply because the question in this case is not the right of the VanHorns to Union representation. The question is the right of the Union to be present at a formal discussion between representatives of the agency and unit employees. That right is reduced to a nullity when the Union is not informed of the meeting and the employee is directly encouraged to exclude the Union from participation in the meeting. Evidence introduced to show that Mr. Wade offered to allow the

VanHorns to have Union representation is irrelevant.[7] In the context of this case, the statement by Mr. Wade that he could speak more freely without the Union present is clearly violative of Section 7116(a)(1) of the Statute. The only reason it was made in the first place was to attempt to exclude the Union from a meeting which the Union had a statutory right to attend. That the attempt at exclusion proved successful is proof of the pudding. The VanHorns reasonably concluded from Mr. Wade's comment that the presence of the Union would be detrimental to the meeting and, not wishing to engage in useless actions, they were induced to attend a formal discussion to be held without notice to the Union.

The final issue to be decided in this case is whether the statements by Ms. Smith and Mr. Wade, that "Marlene is not for the people" and that "The Union often hurts more than it helps", are violative of the Statute. The General Counsel argues that the statements are coercive because those who made them might influence any future reassignment of the VanHorns, and that therefore the message to the VanHorns could be interpreted by them to mean that their futures are dependent upon their agreement with management's interpretation of the nepotism regulation. Respondent argues that the statements are protected free speech.

The record shows that after these two statements were made by Ms. Smith and Mr. Wade, there was no response from the VanHorns. In other words, the subject was dropped immediately. There was no evidence from the VanHorns to indicate that the circumstances were in any way coercive at the time those statements were made or that they found the statements to be coercive. I conclude that there is no evidence which would tend to indicate that the statements contain any threat of reprisal or force, or any promise of benefit. They were merely gratuitous expressions of personal opinion and, as such, they are protected as free speech.[8]

Having found that on May 19, 1980, and again on November 13, 1980, Respondent conducted formal discussions with bargaining unit employees concerning personnel policies, practices and other general conditions of employment, as described in 5 U.S.C. 7114(a)(2)(A), without affording the Union an opportunity to be represented, and having found that on November 13, 1980, Respondent, through Daniel Wade, communicated to a bargaining unit employee that he could not speak freely at a formal discussion with the employee if the Union were present at such meeting, I conclude that Respondent has engaged in unfair labor practices in violation of 5 U.S.C.

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[7] I need not reach any question of how the right to such representation is affected by additional comments indicating that, in any event, such representation would not be of any benefit.

[8] See, Oklahoma City Air Logistics Center (AFLC) Tinker Air Force Base, Oklahoma, 6 FLRA 159 (6 FLRA No. 32) (June 25, 1981).

7116(a)(1), (5) and (8). Accordingly, I recommend that the Authority issue the following:

ORDER

ORDERED, that the Army and Air Force Exchange Service (AAFES), Ft. Carson, Colorado shall:

1. Cease and desist from:

(a) Conducting formal discussions with bargaining unit employees concerning personnel policies, practices and other general conditions of employment without first notifying the American Federation of Government Employees, AFL-CIO, Local 1345, their exclusive bargaining representative, and affording that Union the opportunity to be represented at those discussions.

(b) Interfering with, restraining, or coercing employees by representing to them that management officials cannot speak freely at formal discussions with employees if the Union is present at such meetings, thereby encouraging employees to meet with management in the absence of requisite notice being given to the Union.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by an authorized representative and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Federal Labor Relations Authority in writing within 30 days from the date of this Order as to what steps have been taken to comply with the Order.

FURTHER ORDERED, that as to all other charges contained therein, the Complaint in Case Nos. 7-CA-1050 and 7-CA-1051 is dismissed.

ALAN W. HEIFETZ
Administrative Law Judge

Dated: December 24, 1981
Washington, D.C.

[7-CA-1050, 7-CA 1051]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

We hereby notify our employees that:

WE WILL NOT conduct formal discussions with bargaining unit employees concerning personnel policies, practices and other general conditions of employment without first notifying the American Federation of Government Employees, AFL-CIO, Local 1345, their exclusive bargaining representative, and affording that Union the opportunity to be represented at those discussions.

WE WILL NOT interfere with, restrain, or coerce employees by representing to them that management officials cannot speak freely at formal discussions with employees if the Union is present, thereby encouraging employees to meet with management in the absence of requisite notice being given to the Union.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice, or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region 5, whose address is: Suite 680, City Center Square, 1100 Main Street, Kansas City, Missouri 64105, and whose telephone number is (816) 374-2199

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Federal Labor Relations Authority

Washington, D.C. 20424

Number 9

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

April 30, 1982

UNFAIR LABOR PRACTICE CASES

5-CA-591 (April 30, 1982)

United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Washington, D.C., and its Central Region and National Treasury Employees Union and National Treasury Employees Union, Chapter 88

7-CA-876 (April 30, 1982)

Department of the Treasury, Bureau of the Mint, U.S. Mint, Denver, Colorado and American Federation of Government Employees, AFL-CIO, Local 695

7-CA-923 (April 30, 1982)

U.S. Department of Housing and Urban Development, Region VIII, Denver, Colorado and National Federation of Federal Employees, Local 1900, Independent

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* THIS REPORT SERIES INCLUDES DECISIONS AND ORDERS OF FLRA ADMINSITRATIVE LAW JUDGES TO WHICH NO EXCEPTIONS WERE FILED WITH THE AUTHORITY WITHIN THE PRESCRIBED TIME LIMIT. IN ACCORDANCE WITH SECTION 2423.29(a) OF THE AUTHORITY'S RULES AND REGULATIONS, AS AMENDED (46 FED. REG. 40674 (1981)), THE FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS IN SUCH ALJ DECISIONS CONSTITUTE, WITHOUT PRECEDENTIAL SIGNIFICANCE, FINDINGS, CONCLUSIONS, DECISIONS AND ORDERS OF THE AUTHORITY.

Y3 F31/21-3:

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF THE
TREASURY, BUREAU OF ALCOHOL, TOBACCO
AND FIREARMS, WASHINGTON, D.C., AND
ITS CENTRAL REGION

(Respondent)

and

Case No. 5-CA-591

NATIONAL TREASURY EMPLOYEES UNION
AND NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 88

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding finding that the Respondent had not engaged in any unfair labor practice as alleged in the complaint, and recommending that the complaint be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (46 Fed. Reg. 40674 (1981)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusion, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., April 30, 1982

James J. Shepard, Executive Director

[5-CA-591]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, WASHINGTON, D.C., AND ITS CENTRAL REGION

Respondent

and

NATIONAL TREASURY EMPLOYEES UNION and NATIONAL TREASURY UNION, CHAPTER 88

Case No.: 5-CA-591

Moira Donohue, Esq.
For the Respondent

Judith A. Ramey, Esq.
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. §7101 et seq. It was instituted by the issuance of a complaint on March 18, 1981 by the Regional Director for Region V of the Federal Labor Relations Authority. The complaint alleges that United States Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, Washington, D.C. and its Central Region, hereinafter referred to as "respondent", violated §7116(a)(1) and (5) by refusing to bargain with National Treasury Employees Union and Nation Treasury Union, Chapter 88, concerning the impact and implementation of a substantial increase in the number and frequency of oral presentations which certain employees were required to make before various public forums, such as area conferences, fraternal or professional organizations, college and university audiences and Federal, State and local government Agencies. Respondent denied the commission of any unfair labor practices in its answer. In the course of this proceeding respondent contends that not only was there no unilateral change in practice or procedure but, if there was a change it was de minimus.

A hearing was held in the matter in Cincinnati, Ohio. All parties were represented and afforded full opportunity to adduce evidence, examine and cross-examine witnesses, and argue orally. The parties also filed timely briefs. Upon consideration of the entire record in this case, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law and recommended order.

Findings of Fact

At all times material herein, the union has been the exclusive representative for employees in respondent's Central Region. Central Region employees represented by the union include Alcohol, Tobacco and Firearms Inspectors.

The record reveals and credited testimony established that Alcohol, Tobacco and Firearms Inspectors employed by respondent have the responsibility for inspecting distilled spirit plants, wineries, breweries, tobacco product factories and the like to insure compliance with various Federal laws and regulations. In their jobs, inspectors examine premises and equipment, analyze reports and records, and meet and deal on a one-on-one basis with various levels of business management. Although the job description of journeymen inspectors does not call for making speeches and oral presentations to public gatherings, it is clear from the record that inspectors have been engaged in such speechmaking activity since as early as 1965.

While a great many of the speeches made by inspectors to public gatherings prior to mid-1979 were voluntarily, it is clear that such oral presentations for public relations purposes were made by inspectors in the Central Region.

The record demonstrates that from at least mid-1979 to June 1980 a substantial number of speeches concerning Gasohol were given by inspectors. Respondent maintains and I credit that many of the alleged speeches involved an inspector or two inspectors manning a booth where they passed out pamphlets and answered questions. Therefore, based on the record there is no way to ascertain which of the alleged speeches was an oral presentation before local gatherings or whether the inspector actually made a prepared speech to a group. Furthermore, there is no way to determine from the record, which speeches were made voluntarily or which oral presentations were required to be made by the inspector's supervisor.

With respect to the number of speeches the record shows that from mid-1979 through June 1980 there were approximately 55 oral presentations given by about 40 different inspectors. The vast majority of inspectors gave only one speech during this period. The oral presentations themselves were from 10 minutes to 1 hour in length. Of the 55 speeches about 35 were concerned with Gasohol. The record also establishes that once the Gasohol issue subsided so did the number of speeches, and this influx must therefore be considered temporary in nature.

Respondent admits that all of the speeches given during the mid-1979 to June 1980 period were not given on a voluntary basis. The union presented three witnesses, two of whom had given oral presentations before Gasohol groups after having been requested to do so by a supervisor and a third, who had been requested to give attend a booth at a state fair, but refused. Only one of the union witnesses, Gary Schuster, gave more than one speech under those circumstances.

The union points to an August 15, 1979 letter setting out such speechmaking activity as part of a voluntary developmental activities program by respondent. The union then asserts that Area Supervisors began to seek speechmaking opportunities and in some manner increase the speech load for inspectors in the Central Region. Respondent contends and I credit that the increase in Gasohol speeches was not at the solicitation of Area Supervisors, but was in response to public and Congressional requests to inform the public about upcoming Gasohol and home fuel production regulations. In fact, respondent maintains that solicitation by Area Supervisors received very little response from the public for speechmaking.

Respondent also maintains and I credit that speechmaking has been a part of the inspectors routine since at least 1965. Further, it asserts that while volunteers were always sought, when volunteers were not available, speeches were assigned to inspectors. While proof is almost impossible, since records of such speechmaking activity were not kept, there is no doubt that some speeches were assigned by inspectors prior to mid-1979. I therefore attach little significance to the fact that the union president who took office in 1980 was not aware that speeches were being made by inspectors in the Central Region prior to 1979.

On May 13, 1980 Union President Marty Connell wrote Robert H. Lumpkin, Regional Personnel Officer invoking the right to negotiate "the substance, impact and implementation of the change" whereby inspectors who did not volunteer, were being assigned speechmaking duties which he considered to be outside the scope of their assignments. Connell's request allegedly was in response to telephone calls from several inspectors who told him that they were being "pressured" into making speeches. Respondent answered on May 30, 1980 stating that it was assigning duties consistent with §7106(a)(2)(3) of the Statute and by implication refused to negotiate over the matter.

Discussions and Conclusions

The issue in this matter is whether respondent should have given the union notice and an opportunity to bargain, pursuant to section 7106(b)

(3), about "appropriate arrangements for employees adversely affected" by respondent's decision to assign inspectors to speechmaking activity. The burden is on the General Counsel to prove by a preponderance of the evidence that the inspectors were, in fact, "adversely affected" and that any impact on bargaining unit employees was substantial before an unfair labor practice can be established where the obligation to bargain is based on section 7106(b)(3). See, Office of Program Operations, Field Operation, Social Security Administration, San Francisco Region, 5 FLRA No. 45 (1981).

While an individual inspector may have been uneasy about making an oral presentation there is no showing of any substantial adverse impact to unit employees herein. It is clear that speechmaking, although much of it voluntary, was part of the inspectors job in the Central Region. As respondent argues, in this temporary situation involving Gasohol speeches, at worst, less than 25% of the inspectors gave speeches and many of those speeches were given by volunteers. Of those who were in fact assigned speeches, each by inference was personally ill-at-ease in giving the speeches. However, this unfortunately does not establish any substantial impact on unit employees. Of equal importance, is the fact that the third union witness, Gary Ballanger, refused to give a speech and there was no showing of any adverse impact because of this refusal.

In my view the General Counsel has not established by a preponderance of the evidence that the assignment of oral presentations was substantial or that such assignments had any adverse impact on inspectors. Aside from the testimony of one inspector that he did not "feel at ease" making speeches I see no adverse impact. Speechmaking was, in fact, assigned to very few inspectors. It is noted that only three instances of speech assignments from among some 150 inspectors was brought out as testimony and one of those inspectors refused to give the speech. Further, the speeches took only a very small portion of the inspectors time since most inspectors made only one speech during this entire period. Furthermore, there is no indication from the record that speechmaking would be used as part of any rating process or that it had any connection with the employee voluntary developmental program. Moreover, there is no showing that the speechmaking increased the inspectors workload or that the temporary assignments to speeches enhanced promotion opportunities for inspectors or that it in any way changed the inspectors working conditions.

Finally, I see no relationship other that the fact that both occurred in the same time frame, between the temporary influx of requests for oral presentations concerning Gasohol and the union's assertion that because of the voluntary development program that oral presentations on a large scale are now a permanent part of the Central Region. While quite a few additional speeches were made during the period in question, there was at the time of the hearing no "assigned" speechmaking activity in the Central Region.

Based on the foregoing, it is found that Respondent's conduct in assigning oral presentations to inspectors had no substantial adverse impact on bargaining unit employees and was not violative of the Statute. Since no violation of section 7116(a)(1) and (5) of the Statute has been shown, I recommend that the Authority adopt the following order:

ORDER

It is hereby ordered that the Complaint in Case No. 5-CA-591 be, and it hereby is, DISMISSED.

Eli Nash, Jr.

ELI NASH, JR.
Administrative Law Judge

Dated: December 17, 1981
Washington, D.C.

[7-CA-876]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE TREASURY
BUREAU OF THE MINT
U.S. MINT, DENVER, COLORADO

(Respondent)

and

Case No. 7-CA-876

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 695

(Charging Party)

ORDER

The Administrative Law Judge issued a Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in any unfair labor practice as alleged in the complaint, and recommending that the complaint be dismissed.

No exception to the Administrative Law Judge's Decision and Order was filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (46 Fed. Reg. 40674 (1981)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., April 30, 1982

James J. Shepard

James J. Shepard, Executive Director

[7-CA-876]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF THE TREASURY
BUREAU OF THE MINT
U.S. MINT, DENVER, COLORADO

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 695

Charging Party

Case No. 7-CA-876

Kenneth B. Gubin, Esquire
Leo G. Hart
For the Respondent

Gavin K. Lodge, Esquire
For the General Counsel

Donald V. Solano
For the Charging Party

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101, *et seq.*,[1] and the Final Rules and Regulations issued thereunder, 5 C.F.R. §2423.1, et seq., was initiated by a charge filed on November 24, 1980 (G.C. Exhs. 1(a) and (d)). A Complaint and Notice of Hearing issued on March 30, 1981, for a hearing on June 8, 1981 (G.C. Exh. 1(c)); on April 24, 1981, an Order issued rescheduling the place of hearing (G.C. Exh. 1(e)); and on June 1, 1981, a telegraphic order issued rescheduling the date of the hearing from June 8 to June 9, 1981 (G.C. Exh. 1(i)), pursuant to which a hearing was duly held before the undersigned in Denver, Colorado, on June 9, 1981.

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[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, *e.g.*, 7116(a)(1) will be referred to, simply, as "16(a)(1)".

The gravaman of the Complaint is that the Respondent violated §§16(a)(1) and (8) of the Statute by denying a Mint employee union representation, pursuant to §14(a)(2)(B)(i) and (ii) of the Statute, during the course of a criminal investigation by the United States Secret Service. There is no dispute that the United States Secret Service refused to permit the Union representative, called and made available by Respondent, to be present during its investigative interview of an employee of Respondent; nevertheless, for reasons set forth hereinafter, I find no violation of the Statute by Respondent, inasmuch as (a) Respondent did call and make available the employee's union representation; (b) Respondent neither conducted nor was present at any investigative interview of any employee at which Union representation was denied; (c) Respondent did not deny union representation at any interview conducted by the Secret Service as the United States Security Service is an independent bureau in the Treasury Department, with a separate mission, organization, lines of command, employees and budget; the record shows, affirmatively and without contradiction, that there is no control between the Bureau of the Mint and the Secret Service; and that the Secret Service is wholly autonomous in the conduct of any investigation under its statutory authority.

All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence hearing on the issues involved, and were afforded opportunity to present oral argument. At the close of the hearing, July 9, 1981, was fixed as the date for mailing post-hearing briefs which date was subsequently extended, on timely motion of Respondent, not opposed by Counsel for the General Counsel, for good cause shown, to July 20, 1981. Counsel for General Counsel and for Respondent each timely mailed a most helpful brief, received on July 24, 1981, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

FINDINGS

1. The American Federation of Government Employees, AFL-CIO, is the exclusive representative of all professional and nonprofessional employees of the Department of the Treasury, Bureau of the Mint, including special police and guards, excluding special police and guards

assigned to the Philadelphia Mint, management officials, employees engaged in federal personnel work in other than a purely clerical capacity, confidential employees, and supervisors. See, U.S. Department of the Treasury, Bureau of the Mint, 2 FLRA 458 (1980). I take administrative notice of the Authority's statement that,

> "The Mint's mission includes the production of coins, both domestic and foreign; the custody, processing, and movement of bullion; and the manufacture of various numismatic items. Headed by a Director, who is supported by a headquarters staff located in Washington, D.C., the Mint operates seven field facilities. These facilities include the United States Mints in Philadelphia and Denver, the United States Assay Offices in San Francisco and New York, the United States Bullion Depositories in Fort Knox and West Point, and the Old Mint in San Francisco...." (2 FLRA at 459)

Although neither the AFGE nor its Local 695 represented the employees of the Denver Mint in a separate unit prior to the consolidation in 1980 (See, 2 FLRA at 458), as appears to be alleged in the Complaint, the AFGE was the exclusive representative of employees of the Bureau of the Mint in three units: (a) all nonprofessional employees, (b) all professional employees; and (c) all guard employees, excluding the guards at the Philadelphia Mint, which, of course, included the employees of the Denver Mint (See, Respondent's Answer, G.C. Exh. 1(d) at 2 FLRA at 458).

2. On November 19, 1980, a Mint Security Policy Officer discovered two (2) new misstruck pennies in the tray containing the personal effects of Mr. Frederick J. Jackson, a Mint forklift operator, as he was leaving at the end of the day shift. Mr. Dean Q. Permenter, Secret Security, U.S. Mint, was informed and had the guards bring Mr. Jackson and the coins to his office (Tr. 39). Mr. Permenter told Mr. Jackson "... we might question him, and if so, he would be entitled to Union representation" (Tr. 39). Mr. Permenter asked Mr. Jackson if wanted a Union repressentative and Mr. Jackson said that he did, whereupon Mr. Permenter obtained a Union representative for him, Mr. David M. Garcia, then Swing Shift (3:00 p.m. to 11:00 p.m. shift) Chief Steward. Mr. Garcia came to Mr. Permenter's office immediately and spoke privately with Mr. Jackson (Tr. 10).

3. In the meantime, Mr. Permenter, after examining the coins, determined that there was a probable theft of, or attempt to steal, Government coins, the misstriking of which makes then collector's items (Tr. 42-43), and had called the Secret Service to investigate the possible criminal violation.

4. Mr. Permenter told Mr. Garcia when he arrived that "... we were waiting for Secret Service to arrive" (Tr. 10; 25). About 30 minutes

later (Tr. 27), Special Agents Robert L. Haven and Lawrence J. Hoppe arrived and Mr. Permenter furnished an office for their use.

5. Mr. Permenter first met with Agents Haven and Hoppe, in the office he made available for their use, gave them the names of the people involved, and told them what had happened (Tr. 44, 67, 93). Agents Haven and Hoppe then interviewed Officer Douglas A. Stenlund (Tr. 93).

6. Mr. Jackson was then interviewed by Agents Haven and Hoppe. There is a slight conflict concerning precisely what was done and said, and, after weighing carefully the testimony of Messrs. Garcia, Jackson, Permenter and Haven, I fully credit Mr. Permenter's testimony, in part because I found him to be a wholly credible witness, in part because his testimony was corroborated in significant respect by the testimony of Mr. Jackson, and in part because his testimony was fully corroborated by the testimony of Special Agent Haven whom I also found to be a very credible witness. On the other hand, I did not find portions of Mr. Garcia's testimony convincing as it was contrary, in certain material respects, from the testimony of all other witnesses.[2/] Mr. Permenter testified, in relevant part, as follows:

> "Q. What was your involvement with the case when the Secret Service Agents arrived?
>
> "A. When the Secret Service Agents arrived, I told them what had happened. I gave them the names of the people involved and furnished an office for their use and talked to the people.
>
> "Q. Did you ask the Secret Service Agents to participate in the interview?
>
> . . .
>
> "A. No, I did not.
>
> "Q. Again, why not?

[2/] I specifically do not credit Mr. Garcia's testimony that when Special Agents Haven and Hoppe arrived, and they had been directed to another office, Mr. Permenter motioned and "said, just Fred only" (Tr. 11); or that Mr. Permenter, in response to his (Garcia's) inquiry as to whether he would be allowed to go with Fred (Mr. Jackson) "said no" (Tr. 12); or that "There was no one else there but myself. So I walked up to the door, knocked, introduced myself ... To the agents" (Tr. 12). Nevertheless, there is no dispute or disagreement, as Mr. Garcia stated, that Special Agent Haven told him he would not be allowed in the room with Mr. Jackson while he was being question (Tr. 12).

"A. Because it was their investigation. Once we refer it to them, we stay out of it. They handle it.

"Q. Did Union Steward Garcia make any request of you after the agents arrived?

"A. Yes. He asked me if he could be present in the office with the Secret Service while they were interviewing Mr. Jackson.

"Q. What did you say to him?

"A. I told him that I doubted it, but, however, he should ask one of the Secret Service Agents.

"Q. Then what did you do?

"A. I went over to the door where the Secret Service Agents were and called one of them outside and told him Mr. Garcia was a Union Representative of Mr. Jackson. He wanted to know if he could sit in on the interview.

"Q. Are you certain that you went to the door and knocked on it? Is it possible that Mr. Garcia did it?

"A. No. He went with me.

. . .

"Q. Did you participate in the conversation?

"A. Not after he asked them, Mr. Garcia asked them if he could come in and that he was a Union representative, if he could come and sit in on the interview. The Secret Service Agent told him, no, he couldn't." (Tr. 44-46).

. . .

"Q. And I believe you motioned in the direction where Jackson and Garcia were sitting and waved them toward you or gestured in some way, didn't you?

"A. No.

"Q. What did you do?

"A. I told one of the guards to bring Jackson into the office along with the coins and the box that the coins were in.

"Q. What happened? Were Jackson and Garcia seated at that point?

"A. Yes.

. . .

"Q. (By Mr. Lodge) And what happened when Mr. Garcia and Mr. Jackson came to the door? Did you tell Mr. Garcia he could not go in?

"A. No.

"Q. Did you tell him they only wanted Fred or Mr. Jackson?

"A. No. He asked me if he could go in. I told him that I doubted that they would allow him to go in, however, he should ask one of the Secret Service Agents.

"Q. Did he do that afterwards?

"A. I have already testified to that. Yes, that we did knock on the door, one of them came out. I introduced him, and he asked him.

"Q. Is it possible the (sic) Mr. Garcia instead knocked on the door himself?

"A. I don't think so. I think I did.

"Q. You were not in the room the whole time when Mr. Garcia was in the room talking to the agents?

"A. He wasn't in the room. He was in the hallway; and I was in the hallway also.

. . .

"Q. And you heard Mr. Garcia ask the Secret Service Agents if he could sit in on the interview?

"A. Yes.

"Q. And you heard the agents, or one of the agents tell Mr. Garcia that he could not?

"A. That's right." (Tr. 68-70).

Mr. Jackson testified, in part, as follows:

"Q. About how long did you and Mr. Garcia wait for the Secret Service.
"A. About a half hour, I guess.

"Q. And what happened when they arrived?

"A. Shortly after they arrived, they had a little

JUDGE DEVANEY: They, who had this conference?

THE WITNESS: Dean Permenter and the two agents" (Tr. 26).

Special Agent Haven testified, in part, as follows:

"A. Just as we were beginning to enter the interview room, and as I do recall, Mr. Jackson was at that time seated, a knock came on the door. I looked up to the door. I don't recall at this point whether I introduced myself to Mr. Jackson or not, but a knock did come on the door. I looked up and through the glass partition did notice that Mr. Permenter was standing there with an individual I did not know. I opened the door, and at that point, Mr. Permenter introduced an individual as a Union Representative and explained this representative, or the representative himself explained that he would like to gain admittance to the interview.

"Q. What was your reply to that?

"A. I said, no. I said actually, no, unless he could be considered legal counsel for this individual. He said he was not." (Tr. 94).

. . .

"Q. Going back to the conversation with Mr. Garcia, did Mr. Permenter participate in that conversation after the introduction of Mr. Garcia to you?

"A. After the introduction and after Mr. Permenter's relating that this individual would like to gain admittance to the interview, I don't recall him stating anything else.

"Q. Why did you not permit the Union Representative to enter the room?

"A. Well, it's not our policy to open up these individuals (sic) to persons other than legal counsel.

"Q. Did anyone influence your decision not to permit him to enter?

"A. None whatsoever.

"Q. It was your decision entirely?

"A. Yes, sir.

. . .

"Q. ... Had Mr. Permenter requested you to permit the Union Representative to participate in the interview with Jackson, would you have assented in such a case?

. . .

"THE WITNESS: I would have out of courtesy discussed it with Mr. Permenter in private, but I would have myself pressed for no Union Representative at all. Of course, it did not come to that. He did not press for it. But if it had come to that, I would have discussed it privately with him and advised strong objections to allowing a Union Representative.

"Q. (By Mr. Gubin) Would you have permitted it had he asked you?

"A. No.

. . .

"Q. Who did you consider that you were representing when you conducted the interview, what agency?

. . .

"THE WITNESS: Well, I was representing strictly the United States Secret Service.

"Q. (By Mr. Gubin) Did you consider that you were also representing the U.S. Mint?

"A. No, sir.

. . .

"Q. Did anyone from the Mint participate in that investigation?

"A. No, sir.

. . .

"Q. (By Mr. Gubin) Did anyone from the Mint request to join in on the investigation?

"A. No, sir.

"Q. Was the investigation done with the intent to facilitate administrative disciplinary action against Mr. Jackson by the Mint?

"A. No, sir, not at all.

"Q. Did you present the case to the Assistant United States Attorney for decision on criminal prosecution?

"A. Yes, I did. If I might back up to the question you had before that, as I do recall, that particular day I did inform Mr. Jackson specifically of the nature of that interview pertaining to a criminal investigation. And at no point during that investigation were we concerned with administrative problems in the investigation. And we were not there for administrative remedies of any sort.[3]

---

[3] Mr. Jackson stated that,

> "Mr. Haven said ... we were called in here by the Mint to investigate this and whatever we decide doesn't -- they can do whatever they want even if we decide to prosecute or not. The Mint can do whatever they want." (Tr. 31).

"Q. Fine. Do you recall when you referred the case for criminal prosecution?

"A. It was on November the 24th of 1980, and I did speak with Assistant United States Attorney Robert K. Gunther." (Tr. 94-99).

7. Agent Haven read Mr. Jackson his Miranda rights and he waived those rights in writing (Tr. 29-30, 97).

8. Respondent conducted its own independent investigation (Tr. 46-47) and on November 25, 1980, issued a "Notice of Proposed Removal with Indefinite Suspension During Notice Period" (Mint Exh. 3) and on January 9, 1981, removed Mr. Jackson from service (Mint Ex. 2).

9. As noted above, Agent Haven referred the case to the Assistant United States Attorney for prosecution on November 24, 1980, and prosecution was declined; however, the investigation was continued and the report of investigation was submitted on January 14, 1981 (Mint Exh. 4), and a copy was sent to the Mint, on or after January 14, 1981 (Tr. 73, 103). Mr. Permenter did receive calls from the Secret Service during the course of their investigation "to keep me informed" (Tr. 46, 107).

10. The chain of command of the Bureau of the Mint does not include the United States Secret Service (Tr. 63, 79, 80-81); the Mint has no authority over the Secret Service (Tr. 63, 81); the Bureau of the Mint and the Secret Service have separate missions (Tr. 63, 81), separate budgets (Tr. 63, 81), separate employees (Tr. 63 81) and separate chains of command (Tr. 63, 81). Mr. James S. Griffiths, Special Agent In Charge, Denver Field Office, United States Secret Service, testified that the Secret Service, under 18 U.S.C. §§332 and 3056, has specific authority to investigate thefts of coins, obligations and securities of the United States (Tr. 81-82); that investigations under those statutes are on behalf of the U.S. Secret Service (Tr. 82); that the Secret Service does not conduct investigations jointly with other agencies (Tr. 82); that when an agency, or any other source, advises the Secret Service of the possibility of a criminal violation within its jurisdiction, the referring agency, or other source, cannot direct the Secret Service to terminate its investigation (Tr. 83-84); that, as a matter of policy, union representatives are not permitted to be present during a criminal interview, even if requested by the referring agency, including the Mint (Tr. 85, 86, 88-89), for the reason that it is the Secret Service's investigation and it is up to the Secret Service to determine how to conduct that investigation (Tr. 86).

CONCLUSIONS

The right asserted to have been violated in this case is that set forth in §14(a)(2) which provides:

> "(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at --
>
> "(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if -
>
> "(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
>
> "(ii) the employee requests representation." (5 U.S.C. §7114(A)(2)(B)).

Section 3(a)(3) of the Statute defines "agency" as follows:[4]

> "(3) 'agency' means as Executive agency ...." (5 U.S.C. §7103(a)(3)).

Although the statutory definition of "agency" can include a Department, cf., Secretary of The Navy, Department of the Navy, Pentagon, A/SLMR No. 924, 7 A/SLMR 932 (1977), the meaning to be ascribed to the term necessarily depends on the breadth of recognition accorded and the circumstances involved. Thus, in Naval Air Rework Facility, Pensacola, Flordia, A/SLMR No. 608, 6 A/SLMR 67, 6 A/SLMR Supp. 1 (1976), FLRC No. 76A-77, 5 FLRC 303 (1977), A/SLMR No. 873, 7 A/SLMR 617 (1977), the Assistant Secretary held, pursuant to principles enunciated by the Council, that,

> "... when ... acts or practices which constitute unfair labor practices by 'agency management', as defined in Section 2(f) of the Order, [are found] the Order provides no basis for drawing artificial distinctions between organizational levels of such agency management so as to relieve them of the responsibility for their acts which would otherwise be violative of the Order. The Council found that no distinction exists between alleged violations of

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[4] I am aware that the definition of "Agency" in Section 2(a) of Executive Order 11491, as amended, was different and that Section 2(f) of the Executive Order further defined "Agency management"; nevertheless, the legislative history of the Statute demonstrates that Congress intended the term to have the same general meaning under the Statute as it had had under the Executive Order. See, e.g., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, 96th Cong., 1st Sess., Committee on Post Office and Civil Service, Committee Print No. 96-7 (November 10, 1979), pp. 130, 186, 246, 315, 380, 455, 500, 557, 685.

> 19(a)(6), on the one hand, and alleged violations of the remainder of 19(a) on the other hand, when the acts and conduct are attributed to agency management at a higher organizational level within the agency than the level of exclusive recognition. That is, when acts and conduct constitute a refusal to confer, consult, or negotiate as required by the Order, such acts and conduct may properly be found violative of Section 16(a)(6) regardless of the organizational level of the agency management which committed the violative conduct ...." (7 A/SLMR at 919).

See, also, Internal Revenue Service, A/SLMR No. 998, 8 A/SLMR 264 (1978); Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, A/SLMR No. 1049, 8 A/SLMR 586 (1978); Internal Revenue Service, A/SLMR No. 1091, 8 A/SLMR 828 (1978); Veterans Administration, 1 FLRA 887, 1 FLRA No. 101 (1979); Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Hartford District Office, 4 FLRA No. 37 (1980).

Without expressing any opinion as to whether, under the Statute, a higher level of management can, or should, be found guilty of a violation 16(a)(5) when it is responsible for a refusal to bargain at the organizational level of exclusive recognition or whether, under the Statute, agency management at the organizational level of exclusive recognition should be absolved of a violation of both 16(a)(1) and (5) where it followed the directions from higher agency management, cf. Headquarters, Defense Logistics Agency and Department of the Army and Department of Defense and Cameron Station and Headquarters, U.S. Army Military District of Washington, Case Nos. 3-CA-664, 3-CA-1044, 3-CA-1089, 3-CA-1090 and 3-CA-1081 (ALJ, July 10, 1981) at page 18 et seq., there is no doubt whatever, in my opinion, that the two basic tenets of Pensacola Naval Air Rework, supra, namely: (a) that there is no basis for drawing artificial distinctions between organizational levels of agency management so as to relieve them of responsibility for their acts which would otherwise constitute unfair labor practices; and (b) that agency management above the organizational level of exclusive recognition may be held accountable for their conduct which results in an unfair labor practice at the organizational level of exclusive recognition, not only can, but must, remain fully operative under the Statute.5/

5/ The concept, under Naval Air Rework Facility, Pensacola, Florida, supra, that agency management at the organizational level of exclusive recognition should ever be absolved of liability for its conduct, even though it followed the direction of higher authority, has always troubled me. The most obvious answer under the Statute, and the one I would most strongly urge in an appropriate case, is, that organizational levels of management, in a bargaining case, for example, are

(continued)

Nevertheless, while I deem it settled under the Statute that agency management above an organizational level of exclusive recognition is responsible for its conduct which results in an unfair labor practice, Respondent committed no unfair labor practice in this case.

Section 14(A)(2) is permised on, "An exclusive representative in an agency ...." and "agency" in this case means the Bureau of the Mint. Section 14(a)(2) thus provides,

> "(2) An exclusive representative ... in an agency shall be given the opportunity to be represented at -
>
> "(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives ...; or
>
> "(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if --
>
> "(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
>
> "(ii) the employee requests representation." (5 U.S.C. §7114(a)(2)) (Emphasis supplied).

As set forth above, neither the Bureau of the Mint, the agency herein, nor any representative thereof, conducted any examination of Mr. Jackson at which the exclusive representative, requested by Mr. Jackson, was not given the opportunity to be present. To the contrary, Respondent, fully in accordance with §14(a)(2)(B), before questioning Mr. Jackson, asked if he wanted Union representation, and when he responded in the affirmative, promptly secured Union representation for him.

Messrs. Haven and Hoppe, Special Agents, United States Secret Service, were neither agents of Respondent Mint, nor did they act on Respondent Mint's behalf, in conducting their investigation of the possible criminal violation, namely an attempted theft of misstruck coins. The United States Secret Service conducted its investigation pursuant to its statutory power, inter alia, to "detect and arrest any person committing any offense against the laws of the United States relating to coins, obligations, and securities of the United States ...." (18 U.S.C. §3056) and Section 332 of Title 18, which makes it a crime,

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5/ (Continued)
immaterial, i.e., a refusal to bargain by an agency is a refusal to bargain regardless of the level of management responsible and the order should, inter alia, direct bargaining at the appropriate level without regard to whether higher authority may have caused the refusal to bargain.

inter alia, "... if any such officer or person [employed at" any of the mints or assay offices of the United States"] shall embezzle ... any of the coins struck or coined at the said mints ...." (18 U.S.C. §332).

The United States Secret Service, while part of the Department of the Treasury, is a separate, distinct and independent Bureau within the Department of the Treasury wholly independent of the Bureau of the Mint. Thus, its mission, fixed by statutory authority, is wholly different from the mission of the Mint; it has a wholly separate budget, employees, and supervision; and there is no control by the Bureau of the Mint over operations of the Secret Service.

Although Respondent Mint notified the Secret Service that an employee, Mr. Jackson, had been found with misstruck coins in his personal effects, as 18 U.S.C. §4 would appear to have required, the investigation by the Secret Service, of the suspected crime, was not rendered an investigation on Respondent Mint's behalf as a result of such notification. To the contrary, the Secret Service investigated solely in pursuance of its power, and obligation, as set forth in 18 U.S.C. §§332 and 3056.

Nor is there any doubt whatever that: (a) the Secret Service does not conduct investigations jointly with any other organization; (b) the Secret Service determines how it will conduct its investigations; or (c) it is the policy of the Secret Service that it will not open its interviews to any person, including union representatives, except legal counsel. Indeed, as I have found, Respondent Mint, when Mr. Jackson was called to be interviewed by Special Agents Haven and Hoppe, introduced Mr. Jackson's Union representative, Mr. Garcia, and Agent Haven was informed that Mr. Garcia, as Mr. Jackson's Union representative, wished to be present during the interview of Mr. Jackson. Agent Haven refused, unless, as he testified, Mr. Garcia could be considered legal counsel for Mr. Jackson, which Mr. Garcia said he was not.

Accordingly, while it is certainly true that Mr. Garcia, Mr. Jackson's Union representative, was not permitted to be present during his interview by the Secret Service, the refusal to permit Mr. Garcia to be present was solely the decision of Agent Haven and was made in accordance with the policy of the Secret Service. Indeed, the record is clear that, although Mr. Permenter did not, it is true, specifically request that Mr. Garcia be permitted to be present, such request, if made, would not have been granted. The record shows, both affirmatively and without contradiction, contrary to the assertion of General Counsel (G.C. Brief pp. 5-7) that the Secret Service did not, in investigating Mr. Jackson, act as agent of the Mint nor was the investigation of the Secret Service jointly conducted with representatives of the Mint. To be sure, the Mint did conduct its own independent investigation, issued its Notice of Proposed Removal of Mr. Jackson on November 25, 1980, and removed Mr. Jackson from service on January 9, 1981; nevertheless, although it is obvious that the same conduct did, indeed, give rise to two quite separate and distinct causes of action, neither the fact that Respondent Mint and the Secret Service simultaneously investigated the same occurance nor the fact that the Secret Service, as a matter of courtesy, called Respondent and advised it of the progress of its investigation and on, or after, January 14, 1981, furnished Respondent Mint with a copy of its report of investigation, rendered the investigation of the Secret Service a joint investigation with Respondent Mint. To the contrary, as I have found, the record firmly shows, wholly without contradiction, that the investigation by the Respondent Mint was wholly independent of the Secret Service's investigation. Section 14(a)(2)(B) applied to any examination of Mr. Jackson in connection with the Respondent Mint's investigation of him and was fully complied with by Respondent Mint. Section 14(a)(2)(B) did not apply to the examination of Mr. Jackson by the Secret Service for the reasons that: (a) Special Agents of the United States Secret Service are not representatives of the agency, Respondent Mint; (b) Respondent Mint is wholly without authority to control investigations of the Secret Service; and (c) the United States Secret Service acted pursuant to its independent statutory authority, inter alia, the detect and arrest any person committing any offense against the laws of the United States relating to coins, etc.

The mere fact that there are two distinct causes of action, one for employment discipline and the other for possible criminal prosecution, clearly is not sufficient, standing alone, to remove an investigation of a possible criminal violation from the application of the provisions of §14(a)(2)(B). If the agency itself conducts the investigation, §14(a)(2)(B) applies to the investigation of a possible criminal violation even if the criminal investigation is conducted by its internal security or criminal investigative "arm". Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Hartford District Office, 4 FLRA No. 37 (1980); Lackland Air Force Base Exchange, Lackland Air Force Base, Texas, 5 FLRA No. 60 (1981). In the IRS case, the interview in question, of a Revenue Officer employed at the Hartford, Connecticut, District Office, was conducted by Inspectors from the New Jersey office of the IRS Inspection Service, Internal Security Division. §14(a)(2)(B) was held to apply to the interview and the agency, Internal Revenue Service, by its denial of the employee's request for representation at the interview, violated §§16(a)(1) and (8) of the Statute. The persons conducting the interview, notwithstanding their classification as "Criminal Investigator", were, undeniably, employees of the agency, Internal Revenue Service, and, a fortiori, representatives "of the agency" within the meaning of §14(a)(2)(B).[6] Not only was such examination foursquare within the meaning of §14(a)(2)(B), but the legislative history plainly shows that Congress specifically intended §14(a)(2)(B) to apply to interrogations by the "agency's internal security division" (Legislative History, supra, p. 694, H. Rep. No. 95-1403; pp. 823-824, Conference Report, H. R. Report No. 95-1717; see, also, Legislative History, supra, pp. 655-645).

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[6] Indeed, this does not appear to have been controverted; although, for various other reasons, application of §14(a)(2)(B) was vigorously contested before the Administrative Law Judge and the Authority and the Agency's petition for review is now pending before the United States Court of Appeals for the District of Columbia Circuit, No. 80-2423.

In the Lackland Air Force Base Exchange case, supra, the interview in question, of a cashier employed at the Lackland Main Exchange, was conducted, principally, by a special agent employed by the Air Force Office of Special Investigation (OSI), Lackland Air Force Base. Section 14(a)(2)(B) was held to extend to the interview, inter alia, because, "... the interview ... was performed jointly by the Respondent and the OSI ...." (Decision of the Administrative Law Judge, adopted by the Authority p. 11).[7]

Both Internal Revenue Service, Hartford District Office, supra, and Lackland Air Force Base Exchange, supra, are distinguishable from the present case in all material respects and nothing contained in either decision stands as precedent for its application to the examination of Mr. Jackson by the Secret Service in this case. Thus, by was of example, the following factors demonstrate both the inapplicability of those decisions to the present case and that §14(a)(2)(B) does not extend to an examination by the Secret Service of a possible criminal violation: First, the United States Secret Service is an independent Bureau within the Department of the Treasury as to which Respondent Mint, the agency herein, is wholly without power or authority to supervise or control. By contrast, Internal Security Division was, obviously, a constituent part of the Internal Revenue Service in the IRS case. Second, the Secret Service acts pursuant to specific statutory authority, inter alia, to "detect and arrest any person committing any offense against the law of the United States relating to coins ....". By contrast, neither IRS' Internal Security Division nor the Lackland Air Force Base OSI acts pursuant to similar independent statutory authority. Third, the Secret Service does not conduct its investigations jointly with any other agency. By contrast, the Internal Security Division was, nevertheless, the agency, i.e. Internal Security Service and OSI did act jointly with representatives of the Exchange. Fourth, Respondent Mint, the agency herein, did, fully in accordance with §14(a)(2)(B) of the Statute, contact and make available Mr. Jackson's Union representative and did, with the Union Representative, advise the Secret Service that Mr. Garcia wished to be present, as Mr. Jackson's Union representative, during their (the Secret Service's) interview of Mr. Jackson; and it was solely, the Secret Service, through Special Agents Haven and Hoppe acting pursuant to the policy of the Secret Service, who denied the Union Representative, not an attorney, permission to be present at the interview. By contrast, in the IRS case, the Group Manager and the Internal Security Division Inspectors, all representatives of the agency, denied the request for representation, and in the Lackland case the Respondent Exchange steadfastly failed and refused to provide union representation. Fifth, the Respondent Mint, the agency herein, conducted its own independent investigation. By contrast, the investigation in the IRS case was wholly by the agency, Internal Security Service, notwithstanding that the investigators were employees of its Internal Security Division, and in the Lackland case the investigation was not only jointly conducted by representatives of the Exchange and OSI, but, as the Administrative Law Judge stated, "... The services of the OSI were fully utilized by the Respondent in connection with the performance of Respondent's responsibility to resolve the factual issues involved ...." (5 FLRA No. 60, decision of ALJ at p. 11). Accordingly, without more, I conclude that neither of the foregoing decisions is controlling herein and I further conclude that the examination of Respondent's employee by the United States Secret Service was not an examination by a representative of the Respondent agency, the Bureau of the Mint, within the meaning of §14(a)(2)(B) and, as there was no examination of an employee in the unit by a representative of the Respondent agency, *a fortiori*, Respondent did not violate either §16(a)(1) or §16(a)(8) of the Statute, nothwithstanding that the United States Secret Service denied the employee's request for Union representation during its interview of him.

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[7] Indeed, I have no doubt whatever, had it been appropriately alleged, that, even if the examination had been conducted solely by OSI without the presence of the Exchange, the examination would have been subject to §14(a)(2)(B) inasmuch as the term "agency" is certainly broad enough to encompass all activities of an installation, Naval Air Research Facility, Pensacola, Florida, supra. Certainly, by no stretch of the imagination, can I conceive that the application of §14(a)(2)(B) may be avoided, or evaded, by having different employees of the same activity conduct the examination.

I am fully aware of the post-enactment statement of Congressman Ford (Legislative History, *supra*, at p. 995), cited and relied upon by General Counsel. Because it was a post-enactment statement, in a strict sense it is not part of the legislative history (See, also, *Internal Revenue Service, Detroit, Michigan*, 5 FLRA No. 53 (1981) (decision of ALJ, adopted by the Authority, at p. 12, n. 8; *Department of the Treasury, Internal Revenue Service, Midwest Regional Office, Chicago, Illinois*, Case No. 5-CA-1052 at p. 12, n. 16 (ALJ, December 11, 1981)); nevertheless, I have given careful consideration to this statement together with the legislative history, including, but not limited to: H. Report No. 95-920, to accompany H.R. 3793, from which 14(a)(2)(B) evolved (Legislative History, *supra*, pp. 644-645); H. Report No. 94-1403 (Legislative History, *supra*, p. 694); and Conference Report, H. Report No. 95-1717 (Legislative History, *supra*, pp. 823-824), and find nothing that would support, much less require, applicability of §14(a)(2)(B) to an investigation conducted by the Secret Service of a possible criminal violation pursuant to its grant of statutory power and authority. Indeed, I find Congressman Ford's post-enactment statement, *i.e.*, "The need for codifying these rights was made necessary by the fact that agencies in some circumstances may be unable to bind investigators to this right by the collective bargaining contract when the investigators are from outside that agency or from outside the level of management at which the union has exclusive representation." (Legislative History, supra, p. 995), is merely a reiteration of the Congressional intent more fully set forth in the legislative history (See, for example, Legislative History, supra, pp. 644-645, 694, 823-824). In any event, I conclude, for reasons set forth above, that the United States Secret Service was not a representative of the abency, herein the Bureau of the Mint, within the meaning of §14(a)(2)(B) of the Statute when it conducted its interview of a unit employee with regard to a possible criminal violation. Where there is a separate cause of action, possible violation of the Criminal Code, and the investigating authority, here the United States Secret Service, is wholly separate and independent from the agency in which the employee is employeed, here the Bureau of the Mint, and the investigating authority conducts its investigation pursuant to independent statutory authority, §14(a)(b)(2) cannot, and does not, extend to its investigations, inter alia, for the reason that the agency, herein the Bureau of the Mint, is without authority to control the manner in which the Secret Service conducts its investigations.

As noted, the agency, Bureau of the Mint, did, pursuant to §14(a)(2)(B), promptly make available, at the employee's request, Union representation and the agency, Bureau of the Mint, neither conducted any investigation at which Union representation was denied nor did it deny Union representation at the investigation conducted by the Secret Service. Accordingly, Respondent Bureau of the Mint did not violate either §16(a)(1) or §16(a)(8) of the Statute as alleged and, therefore, it is recommended that the Authority issue the following:

ORDER

The Complaint in Case No. 7-CA-876 be, and the same is hereby, dismissed.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: December 16, 1981
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

U.S. DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
REGION VIII, DENVER, COLORADO

(Respondent)

and

Case No. 7-CA-923

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1900, Independent

(Charging Party)

ORDER

The Administrative Law Judge issued a Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in any unfair labor practice as alleged in the complaint, and recommending that the complaint be dismissed.

No exception to the Administrative Law Judge's Decision and Order was filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (46 Fed. Reg. 40674 (1981)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., April 30, 1982

James J. Shepard

James J. Shepard, Executive Director

[7-CA-923]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
500 C STREET, SW., SUITE 3-N-73
WASHINGTON, D.C. 20424

U.S. DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT
REGION VIII, DENVER, COLORADO

Respondent

and

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1900, Independent

Charging Party

Case No. 7-CA-923

Cathy A. Auble, Esquire
Ronald Broun, Esquire
For the General Counsel

William C. Cregar, Esquire
For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.,[1] and the Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., was initiated by a charge, filed on December 29, 1980 (G.C. Exh. 1-B), alleging violations of §§ 16(a) (1) and (5) of the Statute. The Complaint and Notice of Hearing issued on March 30, 1981 (G.C. Exh. 1(E)), the Complaint alleging a violation only of § 16(a)(1). Pursuant to the Complaint and Notice of Hearing, a hearing was duly held before the undersigned on June 10, 1981, in Denver, Colorado.

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[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, e.g., Section 7116(a)(1) will be referred to, simply, as "16(a)(1)."

The issue presented is whether Respondent violated § 16(a)(1) of the Statute by making space available to the Federal Women's and Hispanic Program Committees while denying space to the exclusive representative for the purpose of conducting a bake sale to raise money for the Local and by denying space for the Union to conduct a training program for stewards. Although I have serious reservations that even disparate denial of a union's request to use agency facilities to raise funds and to conduct a training program for union stewards could constitute an independent violation of § 16(a)(1), i.e., that such denial would ". . . interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter," as, clearly, such use of Respondent's facilities was wholly unrelated to self-organization and Respondent's denial did not affect in any manner employees' rights to self-organization and collective bargaining within the meaning of Section 2 of the Statute. cf., Stowe Spinning Company, et al., 70 NLRB 614 (1946), enf't granted, in part, and denied, in part, 165 F. 2d 609 (4th Cir. 1947), rev'd and rem'd, 336 U.S. 226 (1949), Stipulated Order, 24 LRRM 1682 (1949), I find it unnecessary to reach such question since, for reasons set forth hereinafter, there was no disparate treatment of the Union as such request was not for "customary and routine services and facilities" which were "furnished . . . to other labor organizations having equivalent status" within the meaning of § 16(a)(3) of the Statute, and as the Federal Women's Program Committee and the Hispanic Advisory Committee were agency programs established to enhance the employment concerns of women and of hispanics in the Federal Government.

All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues involved, and all were afforded the opportunity to present oral argument, which right counsel for each party waived. At the close of the hearing, July 10, 1981, was fixed as the date for mailing post-hearing briefs and counsel for the General Counsel and counsel for Respondent each timely mailed a most helpful brief,[2/] received on or before July 16, 1981,

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[2/] The Motion of Counsel for the General Counsel to correct the caption of its brief (Charging Party having erreously been designated, "American Federation of Government Employees," rather than as "National Federation of Federal Employees") is hereby granted; and Respondent's Motion to Correct its Brief (p. 4, n. 7 and p.7) is also granted.

which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

FINDINGS

1. The National Federation of Federal Employees, Local 1900, is the certified exclusive representative of all professional and non-professional employees, with certain exclusions, of the Department of Housing and Urban Development Regional Office, Denver, Colorado, and, at all times material, there was in effect a negotiated agreement (G.C. Exh. 2).

2. Ms. Sandra A. Leachman, at all times material, was the President of Local 1900 (T. 14).

3. As President, during the first week of December, 1980, Ms. Leachman called Mr. Russell Baer, Labor Relations Specialist for Respondent, and "requested the use of a conference room to conduct the fund raising activities for the union." (Tr. 16). Ms. Leachman subsequently explained that the fund raising activity was to be a bake sale (Tr. 16). Mr. Baer told Ms. Leachman he would "get back to her" (Tr. 34) but never did and, because permission for use of the conference room was not given, the planned bake sale was abandoned.

4. Ms. Leachman testified that she "got the idea to have our bake sale" as the result of Federal Women's program of arts and crafts which had been held in a HUD Conference Room in early December. However, as Ms. Linda Jean Hudson, EO specialist for Respondent and Manager of the Federal Women's Program, (Tr. 73) explained the program referred to by Ms. Leachman was a Christmas craft carnival, held on December 2, 1980, "to display craft in various ethnic cultures representing how Hispanic, Black, how different groups celebrated Christmas" (Tr. 77); it was a display of how to make Christmas arrangements, wreaths, candles and candy (Tr. 77-78); and a pinata (Tr. 78). Although sponsored by the Federal Women's Program, no money was collected for any purpose and all employees were invited to attend (Tr. 78).

5. By letter dated January 6, 1981, Ms. Leachman, as President of Local 1900, requested administrative leave, pursuant to Article XXIV of the parties' agreement, for training for named stewards and further stated, "We will need a room [for the training of Union stewards, to be conducted by an NFFE National Representative] and would appreciate your procuring one." (Res. Exh. 1).

6. By letter dated January 19, 1981, Mr. J. Michael Bieszard, Personnel Director, responded to Ms. Leachman's request of January 6 and approved, subject to the maximum hour provisions of the agreement, an allowance of administrative leave; but as to a room for the training stated,

> "In the matter of a conference room, Article IX, Use of Official Facilities and Services, does not provide for the use of a conference room by the union for training purposes.
>
> "Management's position, as it has always been, is to cooperate in all matters of mutual concern. I am available to discuss this matter with you to find a possible resolution if you care to do so." (G.C. Exh. 3).

7. Ms. Leachman stated that she did discuss the matter with Messrs. Bieszard and Baer within a week of Mr. Bieszard's letter and she testified, in part, as follows:

> "A. We discussed the hours allowed for the training of stewards and then I again asked why we couldn't use the conference room.
>
> "Q. What was the response to that question?
>
> "A. I can't remember the whole response but it was something to the effect that it was not in the contract and they didn't want to set a precedent." (Tr. 22).

8. Ms. Leachman further testified that in February she renewed her request with Mr. Baer, because they had not been able, at the time, to get conference room space elsewhere, and that Mr. Baer again refused for the same reason, to permit the Union to use Respondent's conference room.

9. The Union's training session, in fact, was held in February in a conference room of the Small Business Administration on the 22nd floor of the same building.

10. Ms. Mary Ann Vasquez is Hispanic Improvement Program Manager for Respondent (Tr. 65) and the Hispanic Advisory Committee was established by Respondent's Regional Administrator to assist the Hispanic Improvement Program Manager (Res. Exh. 3). As noted above, Ms. Hudson is Manager of the Federal Women's Program and its purpose, pursuant to Executive Order, is to enhance the employment and concerns of women in

the Federal Government. The Federal Women's Program Committee (Res. Exh. 4), essentially like the Hispanic Advisory Committee, serves in an advisory capacity to the Manager of the Federal Women's Program. In each instance the members of the Comittee are appointed, or designated, by Respondent (Tr. 72, Res. Exh. 4); each Committee is a program of Respondent (Tr. 48); and their programs, announced to all employees on HUD stationary, are subject to Respondent's approval.

11. In addition to the Christmas craft carnival, the Federal Women's Program Committee and the Hispanic Advisory Committee jointly sponsored a training session on "Qualification Standards (X-118) and Preparing a Standard Form 171." This was scheduled for March 3, 1981, in Respondent's Conference Room (G.C. Exh. 5) but, due to a plumbing problem, was actually held on March 16, 1981 (Tr. 79). Ms. Vasquez spoke on how to properly fill out the Form 171 and Ms. Hudson spoke on the X-118, Respondent's qualification handbook, and the classification standards and how they affect an employee's career (Tr. 79). Official time was allowed for the training session.

Also, the Federal Women's Program Committee sponsored a "Financial Planning Program" on February 25, 1981 (G.C. Exh. 4), at which an outside speaker discussed: How individuals can begin investing with $25 a month; How to cut interest costs on mortages and other loans; How to cut taxes and insurance costs; and How to beat inflation. Although originally scheduled for Respondent's conference room, both [illegible] time and place were changed and it was actually held in the Small Business Administration's Conference Room (Tr. 80). Employees were allowed one hour administrative leave to attend.

Conclusions

General Counsel does not assert that the Statute conferred any right on a labor organization to use agency facilities for union business, here, to conduct a Union fund raising activity and to train Union stewards, and I perceive none. Indeed, under the substantially identical provisions of Executive Order 11491, as amended, it was held that " . . . use of Agency facilities and equipment by a union is a privilege and not a right. . . ." U.S. Department of the Treasury, Internal Revenue Service, New Orleans District, New Orleans, Louisiana, A/SLMR No. 1034, 8 A/SLMR 497 (1978); Internal Revenue Service, Southeast Region, Appellate Branch Office, New Orleans, Louisiana, A/SLMR No. 1153, 8 A/SLMR 1254 (1978). Nor was any such privilege granted by the negotiated agreement (see, G.C. Exh. 2, Article IX, "Use of Official Facilities and Services") or by prior practice.

I am aware that the National Labor Relations Board, in Stowe Spinning Company, supra, held that the employer interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act, in violation of Section 8(1) thereof, which provisions are substantially similar to §§ 2 and 16 (a)(1) of the Statute, by refusing to permit their employees to meet on company-owned property "when no other suitable property in the community was available" for a meeting. The Supreme Court, in reversing this portion of the decision of the Court of Appeals, in agreement with the Board's decision, stated, in part, as follows:

> ". . . We are asked to overrule the Board's finding that it is an unfair labor practice to discriminate against a union by denying it the only available meeting hall in a company town when the Board finds that the 'sole purpose' of the discriminatory denial is 'to impede, prevent, and discourage, self-organization and collective bargaining by the [company's] employees within the meaning of Section 7 of the Act' (336 U.S. at 227).
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> . . .
>
> ". . . We mention nothing new when we notice that union organization in a company town must depend, even more than usual, on a hands-off attitude on the part of management. And it is clear that one of management's chief weapons, in attempting to stifle organization, is the denial of a place to meet. We cannot equate a company-dominated North Carolina mill town with the vast metropolitian centers where a number of halls are available within easy reach of prospective union members. . . . In the background of discrimination found by the Board in this case, we cannot say that its conclusion should be upset. As we will point out below, the Board may weigh the employer's expressed motive in determining the effect on employees of management's otherwise equivocal act.[3]" (336 U.S. at 229-230).

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[3] Stowe had asserted inter alia, that its denial of facilties to the Union was in accord with § 8(2) of the Act which prohibits employer interference with the formation or administation of a labor organization. Member Reilly had dissented as to this portion of the Board's decision, 70 NLRB at 634-635, and the Board majority, as did the Supreme Court, fully recognized, as the Board majority stated, "Under ordinary circumstances, where facilities other than company property are available to employees for the purposes of holding union meetings, we would view

(Continued)

The 8(1) violation in Stowe Spinning, supra [now Section 8(a)(1) of the Labor Management Relations Act, 1947], as a result of the denial of use of employer facilities, was narrowly confined to: a) self- organization; and b) absence of other facilities; and c) purpose of the denial was to impede, prevent, and discourage self-organization and collective bargaining.

I am not aware of any decision which has found an independent violation of 8(1), or 8(a)(1), of the NLRA which did not directly relate to self- organization, and, indeed, absent interference with the right of employees to self-organization and collective bargaining, no basis for violation of 8(1), or 8(a)(1), is perceived by the denial of a union's request to use facilities of an employer. Certainly, the plethora of decisions involving access by non-employee organizers to facilities of the employer leave no doubt that nothing in the NLRA requires ". . . that the employer permit the use of its facilities for organization when other means are readily available." NLRB v. Babcock & Wilcox Company, 351 U.S. 105, 114 (1956); Central Hardware Company v. NLRB, 407 U.S. 539 (1972), on remand, 468 F. 2d 252 (8th Cir. 1972).

Nor does General Counsel either cite or rely upon the Stowe Spinning, Babcock & Wilcox, supra, line of cases. To the contrary, General Counsel asserts that Respondent violated § 16(a)(1) of the Statute because its denial of the Union's request to use its facilities was discriminatory as it permitted the Federal Women's Program Committee and the Hispanic Advisory Committee access to its facilities, "for substantially similar functions, as the Union sought to hold." (General Counsel's Brief, p. 4).

(Continued)

3/ with suspicion am employer's conduct in supplying a meeting place. However, in a company town, where all meeting facilties are owned by the employer, the use of such facilities by a labor organization is necessary if the employees are really to be free to exercise their rights under the Act." (70 NLRB at 623); and the Supreme Court stated, "The opinion of the Board in this case states that the 'mere granting of a meeting place to a union by an employer under the conditions present here would not . . . in and of itself constitute unlawful assistance to that union. . .' We have said that the Wagner Act 'left to the Board the work of applying the Act's general prohibitary language in light of the infinite combinations of events which might be charged as violative of its terms'. . . Sections 8(1) and 8(2) of the Act would seem to run into each other in the situation before us, where we to forget that the Board is the agency which weighs the relevance of factual data . . . We cannot say that the Board was wrong as a matter of law in view of the setting." (336 U.S. at 231-232).

Although the decisions under the NLRA concerned the conflict between organization rights and private property rights, I find no basis under the Statute, the Executive Order which preceeded it, or the decisions which would warrant a distinction based on Government ownership of property rather than private ownership vis-a-vis the conflict between § 2 rights (essentially the same as § 7 rights under the NLRA) and property rights of the Government. To the contrary, § 16(a)(3) of the Statute permits an agency to furnish to any labor organization, free of the strictures of 16(a)(3), only "customary and routine services and facilties if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status." Accordingly, I deem the principle, as stated by the Supreme Court, equally applicable to § 2 rights under the Statute. In Central Hardware Company, supra, the Court stated, in part, as follows:

> "The principle of Babcock is limited to this accommodation between organization rights and property rights. This principle requires a 'yielding' of property rights only in the context of an organization campaign. Moreover, the allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' § 7 rights. . . . In short, the principle of accommodation announced in Babcock is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and minimal." (407 U.S. at 544-545).

I have serious reservations that § 16(a)(1) is violated, even if the denial of use of agency facilities were deemed discriminatory as to the Union, unless organizational activity is involved; nevertheless, I neither reach nor decide this question since I find no basis for General Counsel's assertion of discrimination against the Union and, at least, in the absence of discrimination, Respondent did not violate § 16(a)(1) of the Statute by denying the Union the use of its facilities for fund raising and for training of Union officials.

First, there is no evidence that Respondent has ever permitted its facilities to be used for fund raising purposes.

Second, the record shows that both the Federal Women's Program Committee and the Hispanic Advisory Committee serve in an advisory capacity to the respective Manager, i.e., the Federal Women's Program Committee to the Manager of the Federal Women's Program; and the Hispanic Advisory Committee to the Manager of the Hispanic Improvement Program. Further, the record shows that all activities conducted are, in actuality, activities of the Program Managers. That is, the respective Committee may suggest but as Ms. Vasquez testified, as to the Hispanic Advisory Committee,

> ". . . If there are problems that (sic) feel need to be addressed I would then decide how it is best to proceed." (Tr. 73).

and as Ms. Hudson testified, as to the Federal Women's Program Commitee,

> "It is a committee that serves in an advisory capacity, also plans information moves and programs. . . ." (Tr. 75).

but,

> ". . . All of my activities are controlled by management." (Tr. 80). (See, also, G.C. Exhs. 4 and 5).

Third, the various programs sponsored by the respective Committees, namely: the Christmas crafts carnival; the Financial Planning Program; and the Training on Qualifications Standards (X-118) and Preparing a Standard Form 171, were of general interest to all employees and all employees were notified and invited to attend. By no stretch of the imagination can the training program of the Federal Women's Program and Hispanic Committee (Qualification Standards and Preparing a Form 171), which concerned matters of common interest to all employees, be equated to a training program for Union stewards. Nor can the Christmas crafts carnival, which merely displayed various crafts, be equated to a Union fund raising activity.

Fourth, the respective Committees, although composed, "in whole or in part of employees," clearly are not "organizations" in which "employees participate and pay dues, and which has as a purpose the dealing with an agency concerning grievances and conditions of employment" within the meaning of § 3(a)(4) of the Statute. Indeed, General Counsel concedes that the Committees are not unions within the meaning of § 3(a)(4) (General Counsel Brief, p. 4). The Committees are advisory bodies to the respective Program Managers and the meetings of the Committees, whose members are appointed or designated by Respondent, constitute a function of Respondent. Moreover, the programs, while sponsored by one or both Committees, are programs of the respective Program Managers and Respondent's use of its facilities for its own purposes does not impose an obligation to make agency facilities available for non-agency purposes.

Fifth, while I find no support whatever in the record that Respondent "used both [Committees] as competitors against the Union," as General Counsel asserts (General Counsel Brief, p. 5), discrimination to constitute a violation of § 16(a)(1) of the Statute, must, at the very least, involve disparate treatment as the purpose for which agency facilities are made available to one employee group verses another employee group. That is, even if the Committees were assumed to act in the nature of employee organizations, and the record is to the contrary, Respondent's denial of persmission to the Union to use agency facilities, for example, to conduct a fund raising activity would be discriminatory only if Respondent had granted permission to another employee organization to use its facilities for a like purpose, namely funding raising; but the record shows no such disparate treatment. To the contrary, the record shows no authorization for use of its facilities for any purpose even substantially like the purpose for which the Union sought to use agency facilities, namely, to conduct a bake sale to raise money for the Union or to train Union stewards. Because the record shows that the Committees served only as advisory bodies to Respondent's Progam Managers, I would find, further, no discrimination because Respondent was not shown to have authorized use of its facilities for any purpose by any employee organization except as specifically provided for, as to the Union, in Article IX of the negotiated agreement.

Sixth, § 15 of the Statute provides for allotments to representatives, at no cost to the exclusive representative or the employees, and § 16(a)(3) makes it an unfair labor practice for an agency:

> "(3) to sponsor, control, *or otherwise assist any labor oranization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status.*[4] (Emphasis supplied).

4/ § 16(a)(3) of the Statute, while reflecting some elements of Section 8(a)(2) of the NLRA is quite different. Section 8(a)(2) of the NLRA provides:

> "Sec. 8(a) It shall be an unfair labor practice for an employer--
>
> . . .
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject is rules and regulations made and published by the Board pursuant to Section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay."

Except as provided in §§ 15 and 16(a)(3), the Statute countenances no assistance to a labor organization. The use of Government facilities for union fund raising would not appear under any circumstances to be "routine;"[5] but, in any event, § 16(a)(3) permits such facilities to be furnished only "if the services and facilities are also furnished on an impartial basis to other labor organizations" and, of course, the record plainly shows: a) that Respondent has not, and does not, furnish its facilities for such purpose to any labor organization; and b) there was, and is, no other labor organization "having equilvant status." Although no issue of violation of § 16(a)(3) is before me and, accordingly, and no decision has been made with regard thereto, nevertheless, the provisions of § 16(a)(3) preclude any finding of a § 16(a)(1) violation on the basis of discrimination unless: a) the requirements of § 16(a)(3) are met; or b) the rights of employees to self-organization and collective bargaining are such as to require that facilities be made available to a union, neither of which was shown in this case. Not only were the Union's request to use Respondent's facilities wholly unrelated to self-organization but, clearly, Respondent's denial was neither intended to, nor did it have the effect of, impeding, preventing, or discouraging self-organization and collective bargaining by its employees within the meaning of § 2 of the Statute. Moreover, the Union, in fact, obtained facilities, in the same building, in which to conduct its stewards' training program.

Certainly, the correlative provisions of §§ 16(a)(5) and 16(b)(5) of the Statute, like the substantially same provisions of Section 8(a) (5) and 8(b)(3) of the NLRA, are intended to assure equality and responsibility in bargaining by making the duty to bargain in good faith, as required by the Statute, a mutual obligation; but, even so, a mutal obligation to bargain in good faith affords no basis whatever for an independent violation of § 16(a)(1) wholly in the absence of either a request to bargain or of a refusal to bargain.[6]

---

[5] That Congress intended "facilities" to be narrowly confined to normal, routine, representational activity is strongly suggested by the only example cited,

> "(e.g. providing equal bulletin board space to two labor organizations which will be on the ballot in an exclusive representation election)" Legislative History of the Federal Serivce Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, Committee of Post Office and Civil Service, House of Representatives, 96th Congress, 1st Sess., Committee Print No. 96-7, November 19, 1979, H.R. Rep. No. 95-1403, p. 695.

Accordingly, for the reasons set forth above, Respondent did not violate § 16(a)(1) of the Statute as alleged and, therefore, it is recommended that the Authority issue the following:

ORDER

The Complaint in Case No. 7-CA-923 be, and the same is hereby, dismissed.

William B Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: December 31, 1981
Washington, D.C.

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[6] Not only does the record show neither a request to bargain nor a refusal to bargain, but the § 16(a)(5) allegation of the Charge was not made a part of the Complaint and, for this reason, alone, could not be considered. See, United States Department of the Army, Fort Polk, Louisiana, A/SLMR No. 1100, A/SLMR 880 (1978).

97/10 - Administrative Law Judge

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Federal Labor Relations Authority
Washington, D.C. 20424

NUMBER 10 May 14, 1982

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

UNFAIR LABOR PRACTICE CASES

Case Nos. 7-CA-533; 7-CA-733 and 7-CA-878 (April 13, 1982)

> Non-Appropriated Fund Instrumentality, Billeting Office, Ellsworth Air Force Base, South Dakota and Janet Thompson

Case Nos. 6-CA-836 and 6-CA-903 (May 13, 1982)

> United States Department of Health and Human Services, United States Public Health Service Hospital and National Alliance of Postal and Federal Employees and National Alliance of Postal and Federal Employees, Local 106

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* This report series includes decisions and orders of FLRA adminsitrative law judges to which no exceptions were filed with the Authority within the prescribed time limit. In accordance with section 2423.29(•) of the Authority's rules and regulations, as amended (46 Fed. Reg. 40674 (1981)), the findings, conclusions, and recommendations in such ALJ decisions constitute, without precedential significance, findings, conclusions, decisions and orders of the Authority.

Y 3. F31/21-3:

[7-CA-533; 7-CA-733; 7-CA-878]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

NON-APPROPRIATED FUND INSTRUMENTALITY
BILLETING OFFICE
ELLSWORTH AIR FORCE BASE, SOUTH DAKOTA

(Respondent)

and

Case Nos. 7-CA-533
7-CA-733
7-CA-878

JANET THOMPSON

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on October 9, 1981, finding that the Respondent had not engaged in any unfair labor practice as alleged in the complaints in the consolidated case, and recommending that the complaints be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (46 Fed. Reg. 40674 (1981)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaints in the consolidated case are hereby dismissed.

For the Authority.

Issued Washington, D.C., April 13, 1982

James J. Shepard

James J. Shepard, Executive Director

[7-CA-533; 7-CA-733; 7-CA-878]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
SUITE 416 - 1111 20TH STREET, NW.
WASHINGTON, D.C. 20036

. . . .

NON-APPROPRIATED FUND INSTRUMENTALITY[1]
BILLETING OFFICE
ELLSWORTH AIR FORCE BASE, SOUTH DAKOTA

Respondent

and

JANET THOMPSON

Charging Party

. . . .

Case Nos. 7-CA-533
7-CA-733
7-CA-878

Lieutenant Colonel Franklin E. Wright
For the Respondent

Nicholas J. Loburgio, Esquire
John H. Rubin, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management

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[1] As amended at hearing (Tr. 15-16). Initially, the complaint stated "Activity" rather than "Instrumentality". Although the amendement was granted at the opening of the hearing, the transcript fails to reflect the change in designation.

Relations Statute, 5 U.S.C. §7101 *et seq.*[2] and the Rules and Regulations issued thereunder, 5 C.F.R. §2423.1 *et seq.*, was initiated by a charge in Case No. 7-CA-533 alleging violations of §§16(a)(1) and (4) of the Statute filed on April 16, 1980 (G.C. Exh. 1(a)), a First Amended Charge filed on July 21, 1980, alleging violation of §16(a)(1) (G.C. Exh. 1(e)), Complaint and Notice of Hearing issued on July 31, 1980 (G.C. Exh. 1(f)) which alleged violations of §16(a)(1) and set the hearing for November 20, 1980, in Deadwood, South Dakota; by a charge in Case No. 7-CA-733 filed on September 2, 1980, alleging violations of §§16(a)(1) and (5) of the Statute (G.C. Exh, 2(a)), an amended charge filed on November 6, 1980 (G.C. Exh. 2(d)) alleging violations by §§16(a)(1), (2), and (5) of the Statute, Complaint and Notice of Hearing issued on November 25, 1980 (G.C. Exh. 2(e)) which alleged violations of §§16(a)(1), (2), and (5) of the Statute and which set the hearing for January 22, 1981, in Rapid City, South Dakota; by an Order, also issued on November 25, 1980, Consolidating Case Nos. 7-CA-533 and 7-CA-733 (G.C. Exh. 1(i) and 2(f)); by an Order issued on November 7, 1980 (G.C. Exh. 1(h)), rescheduling the hearing in Case No. 7-CA-533 from November 20, 1980, to an unspecified date and an Order issued on November 26, 1980 rescheduling the hearing in 7-CA-533 for January 22, 1981 (G.C. Exh. 1(j)); by a charge in Case No. 7-CA-878 alleging violations of §§16(a)(1), (4), and (5) of the Statute (G.C. Exh. 3(a)) filed on December 1, 1980, a first amended charge, filed on December 17, 1980 (G.C. Exh. 3(c)), alleging violations of §§16(a)(1), (2), and (4) of the Statute, Complaint and Notice of Hearing issued on December 18, 1980 (G.C. Exh. 3(d)) which alleged violations of §§16(a)(1), (2), and (4) of the Statute and set the hearing for January 22, 1981, in Rapid City, South Dakota; and an Order, also issued on December 19, 1980 (G.C. Exh. 3(e)) which Consolidated Case Nos. 7-CA-533, 7-CA-733, and 7-CA-878. Pursuant to the foregoing Complaints and Notices of Hearing and Orders of Consolidation, a hearing was duly held on January 22 and 23, 1981, in Rapid City, South Dakota, before the undersigned.

All parties were represented, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues involved, and to present oral argument. At the close of the hearing, at the request of the parties, and for good cause shown, March 6, 1981, was fixed as the date for mailing post-hearing briefs and counsel for Respondent and for General Counsel each timely mailed helpful briefs, received on, or before, March 10, 1981, which, as well as their oral argument, have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

2/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, *e.g.*, §7116(a)(1) will be referred to, simply, as "16(a)(1)".

Preliminary Comment

Although the three cases involved in this proceeding were, and are, consolidated each complaint alleges quite separate conduct. With full recognition that even separate and distinct events may also show a pattern of conduct, I shall, as the parties themselves have, treat each case separately.

FINDINGS AND CONCLUSIONS

I. Case No. 7-CA-533

A. Paragraph 4(a) of the Complaint alleges:

> "(a) On or about February 14, 1980, Respondent, acting by and through Mary Kay Wozna ... did interrogate the Charging Party about a conversation Ms. Wozna had observed on February 13, 1980, between the Charging Party and a bargaining unit employee whom Ms. Wozna believed to be a Union Steward at the time, and did further instruct the Charging Party that she was not to conduct such conversations with any individual at her worksite at any time during the workday, including lunch or break periods." (G.C. Exh. 1(f)).

1. There is no dispute that on the afternoon of February 13, 1980, Ms. Thompson met with Mr. Darrell Oliver in the break room in Building 4101. Mr. Oliver had been Chief Steward of American Federation of Government Employees Local 2228 (Tr. 139) and on the Listing of Officials and Stewards, effective May 14, 1979, was listed as a Steward (Res. Exh. 5). Respondent was not notified of any change in Mr. Oliver's designation as Steward until it received the Listing of Officials and Stewards, effective July 9, 1980 (Res. Exh. 6), although Mr. Oliver testified that he had resigned from the Union in November, 1979 (Tr. 139).

2. There is also no dispute that Ms. Wozna had started to enter the room and, when she saw that Ms. Thompson and Mr. Oliver were present and were working on some papers, she immediately withdrew and Ms. Thompson and Mr. Oliver proceeding with their activities without interruption.

3. There is total disagreement as to whether the meeting had taken place during Ms. Thompson's break. Ms. Thompson's scheduled break time in the afternoon is 2:00 to 2:15 p.m. Ms. Wozna testified that she had taken her own break on February 13 from 2:00 to 2:15 p.m. and that it was after her break, approximately 2:20 p.m., when she arrived at the break room to post a notice (Tr. 326-327). Ms. Wozna made a written notation in Ms. Thompson's file which also noted the time as approximately 1420 (Res. Exh. 1). Both Ms. Wozna's testimony and her written notation

further show that after she (Wozna) withdrew from the break room she heard Mr. Oliver say "maybe she should be careful" to which Ms. Thompson replied, "I don't give a damn I'm on my break" (Tr. 264, Res. Exh. 1). Mr. Oliver fully corroborated Ms. Wozna's recollection as to his statement and Ms. Thompson's reply, stating, in part, as follows:

> "... I remarked to Janet that something to the effect that you should keep it down and kind of be quiet.
>
> "Q. Did Ms. Thompson have any response to that?
>
> "A. She said, 'I don't give a damn if she hears me or not. I am on my break, so what.'" (Tr. 143).[3/]

Mr. Oliver testified that they had gone into the break room at "Roughly two o'clock" (Tr. 141); and that Ms. Thompson was "on her break". Although Mr. Oliver stated his meeting with Ms. Thompson lasted "10, maybe 12 minutes" (Tr. 144), he did not give the time of his departure. Ms. Thompson testified that her meeting with Mr. Oliver lasted "slightly less than 15 minutes" (Tr. 41); that it had begun "right at two o'clock" (Tr. 39); and that Mr. Oliver had left before her break was over (Tr. 41).

4. The following day, February 14, 1980, Ms. Wozna counseled Ms. Thompson, as Ms. Wozna testified, about having visitors "when it wasn't her break time." (Tr. 266-268, 328). She stated that Ms. Thompson had responded that she took her break from 2:15 to 2:30 p.m. Ms. Wozna's testimony was fully corroborated by her contemporaneous entry in Ms. Thompson's 971 file (Res. Exh. 1). Ms. Thompson admitted being counseled on February 14, but asserted that Ms. Wozna said she was "not to have company over there at any time either on break, lunch, before work, after work or during my working hours." (Tr. 43, 45); and further asserted that Ms. Wozna asked, "Who was that guy you had over there yesterday?" to which she had responded, in effect, "He was Darrell Oliver" a friend and neighbor, to which Ms. Wozna had replied," Oh, no he wasn't. No he is a representative of the union" (Tr. 42) and she, Thompson, had said that he was not a representative of the Union, "He is not even a Union member." (Tr. 42).

[3/] Ms. Thompson's testimony was, substantially similar. She testified,

> "A. He said perhaps we should be a little quite in discussing the grievance while Ms. Wozna was there.
>
> . . .
>
> "A. I said I don't care, I'm on my break. I could care less." (Tr. 40).

5. In March 1980, this matter was discussed in a meeting attended by Jean Margaret Banik, Vice President of Local 2228 for Non-Appropriated Funds, Ms. Thompson, Ms. Wozna, and Mr. John R. Little, Billeting Manager. Ms. Banik testified that Ms. Wozna "said that Ms. Thompson had had the union man over visiting her during the working period when she was working" (Tr, 152); that Ms. Thompson interrupted and said that she didn't, "that he was a personal friend of hers and that he was just bringing some papers by for her and that she was on her break." (Tr. 152-153). Ms. Banik further stated that Mr. Little said that Mr. Oliver was a "chief steward" of the Union; that Ms. Wozna stated that "Janet herself [Ms. Thompson] had told them that Darrell Oliver was the chief steward ... and Janet said that she did not and at this time I said, 'Then you both must have been misinformed because Darrell Oliver is no longer a union member.'" (Tr. 153). Ms. Banik made it clear that Ms. Wozna's complaint was that Mr. Oliver had visited Ms. Thompson during working periods (Tr. 156) and that Ms. Wozna said Ms. Thompson was not to have personal visitors on the job (Tr. 156, 159).

CONCLUSIONS

I did not find Ms. Thompson to be a wholly reliable or credible witness. Indeed, her testimony demonstrated a proclivity for misrepresentation. For example, she asserted that she had no gloves because she was never issued a pair but admitted that gloves were available; that "I suppose I could" have got a pair; but that she chose not to use gloves (Tr. 134-135).[4] Mr. Oliver was an entirely credible witness but his testimony as to the time of his meeting with Ms. Thompson is not very helpful. While he testified that Ms. Thompson was on her break he did not say what he believed her break time to have been. He said they entered the break room at "Roughly two o'clock" but did not say what time he left. Ms. Wozna was also a wholly credible witness and, accordingly, I credit her testimony that Ms. Thompson and Mr. Oliver were still in the break room at 2:20 p.m., for which she counseled Ms. Thompson the following day, February 14. Both from her testimony and the entry in Ms. Thompson's 971 file it appears that, on February 14, Ms. Thompson, aware that she was in the break room after 2:15 p.m., sought to justify this by asserting that she took her break from 2:15 to 2:30. Ms. Wozna's

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[4] I am aware that Mr. Chapa testified, in part, that,

> "The cleaning woman said they had asked the manager for rubber gloves ... and said he refused ...." (Tr. 380).

While it is probable that the "cleaning woman" referred to was Ms. Thompson (Tr. 363; but see, Tr. 376), because of the lack of accurate and consistent identification I have not, as urged by Respondent (Respondent Brief, p. 24), attributed this statement to Ms. Thompson.

February 14 entry that she "told her [Ms. Thompson] from now on she is to take break at 9 and 2" (Res. Exh. 1) is consistent with an assertion having been made by Ms. Thompson that she had taken her break at a time other than 2:00 p.m. Ms. Thompson's testimony that, " ... I always take my break at the same time as I always do and that I had ever since I had been there ...." (Tr. 43) was, also, shown not to be correct as she had been counseled on at least two prior occasions concerning the time of her breaks, once in 1977 and again in 1979 (Res. Exh. 1).

Consequently, Respondent did not violate §16(a)(1) by counseling Ms. Thompson on February 14 for having a visitor during working time on February 13, i.e., outside her break time. The record shows that Ms. Wozna on February 13 told Mr. Little, "That it could possibly be a union member conducting union business during normal working hours and we were not aware of the union officer being present. And she wasn't sure who it was and what was going on. And it was not during Ms. Thompson's break time" (Tr. 230); and Ms. Wozna testified that, on February 13, she did not know who was with Ms. Thompson (Tr. 263). It therefore seems highly probable that Ms. Wozna on February 14 did, as Ms. Thompson testified, ask, in effect, "Who was that guy?" or "what was he doing there?" which Ms. Wozna said she didn't remember but might have asked (Tr. 266). Assuming that Ms. Wozna asked Ms. Thompson who had visited her during working hours and/or what was he doing there, such inquiry did not violate §16(a)(1). It is conceded that the parties' agreement provided that if a steward or union officer comes on the premises he is to notify the manager (Tr. 231) and Ms. Wozna's question concerned a legitmate inquiry as to whether a Union official had come to the premises during working hours without notification as required by the agreement, and was not an inquiry concerning engagement in protected activity. Indeed, counsel for the General Counsel conceded at the hearing that the propriety of Ms. Wozna's inquiry turned wholly on whether the meeting inquired about had been on duty time, as I have found, or whether it had been on Ms. Thompson's break.

Finally, did Ms. Wozna on February 14 tell Ms. Thompson that, in the future, she was not to have "company ... at any time either on break, lunch, before work, after work or during working hours" as Ms. Thompson testified, or, as Ms. Wozna testified, did she simply tell Ms. Thompson she was not to have visitors during working time, i.e., "when it wasn't her break time"? I do not credit Ms. Thompson's testimony for various reasons. First, I found Ms. Wozna an entirely credible witness. Second, I found Mr. Little's testimony wholly credible that he had never restricted or have a policy restricting visiting to union officials with employee's during the employee's own time, i.e. during their break time or lunch time (Tr. 231). Third, Ms. Banik testified that when this matter was brought up at a meeting in March, Ms. Wozna's complaint was that Mr. Thompson had had a visitor, Mr. Oliver, during working periods and that Ms. Wozna said Ms. Thompson was not to have personal visitors on the job. It is clear from Ms. Banik's testimony that "working periods" and "on the job" were used interchangeably and that she made no mention whatever of any restriction on visitors during breaks. Indeed, Ms. Banik testified that "There was no specification what she meant" (Tr. 159) by "on the job" which directly refutes Ms. Thompson's testimony that Ms. Wozna, at this meeting, said, "I could not have anyone over there throughout the day, either on my lunch, my break, during my duty hours whatsoever. ..." (Tr. 45). Not only did Ms. Banik's testimony directly refute Ms. Thompson's testimony but, in its entirety, corroborates the testimony of Ms. Wozna. Accordingly, I find that Ms. Wozna did not tell Ms. Thompson that she could not have visitors during non-working periods i.e., during lunch or break periods; but, to the contrary, that Ms. Wozna told Ms. Thompson she was not to have visitors during her working time.

Having found that the preponderance of the evidnece does not support the allegations of the Complaint, the allegations of Paragraph 4(a), and the portion of Paragraph 5 relating thereto, are dismissed.

B. Paragraph 4(b) of the Complaint alleges:

> "(b) On or about March 13, 1980, following a request by the Charging party to have a Union representative present to assist her in the review of her 971 (personnel) file ... Respondent, acting by and through John R. Little ... did violently and abruptly remove the 971 file from the Charging Party's physical possession, striking her in the face with it as he did so, and, acting by and through Mary Kay Wozna did further forcefully instruct the Charging Party that she could no longer look at her 971 file."

1. When Ms. Thompson came to work on March 13, 1980,[5] she gave Ms. Wozna a written request to see her 971 file (Tr. 46). Air Force Form 971 is entitled "Supervisor's Record of Employee" (Res. Exh. 1). Ms. Wozna obtained the file and give it to Ms. Thompson who set down and began reading the file (Tr. 46). Ms. Thompson became agitated by what she saw and removed at least one document "that I particularly wanted" (Tr. 47). She testified, on cross-examination, in part, as follows:

> "A. I had the document or you were calling it a letter in my hand, the entry out of the 971 in my file and Ms. Wozna came back in first and Mr. Little after her and I said immediately, 'I want a Union representative now so that I can thoroughly go through this file.' And there was nothing said.

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[5] Ms. Thompson did not state the time but elsewhere it was shown that she began work at 7:00 a.m. and G.C. Exh. 4 indicates that she received the file at 7:10 a.m.

> Mr. Little rushed at the file. They were yelling and I could no longer see the file. He was yelling and he jerked the file from me and in so doing struck me." (Tr. 98).

2. Ms. Wozna testified that after she had given Ms. Thompson the 971 folder:

> "A. She looked at the folder and then said she wanted a Union representative so I went in and -- she wanted a Union representative then.
>
> "Q. What did you do then?
>
> "A. I went in and told Mr. Little.
>
> "Q. What did he do?
>
> "A. He came in and told her that she could have a union representative and then she had the folder in her hand and he said he would keep it until the union representative came and they could review it then.
>
> "Q. So did he take the folder from her?
>
> "A. Yes.
>
> "Q. Did he strike her at any time?
>
> "A. No.
>
> "Q. Did you scream at Ms. Thompson?
>
> "A. No.
>
> "Q. Did you scream at her that she couldn't see her 971 file anymore?
>
> "A. No. (Tr. 330-331).

3. Mr. Little testified, in part, as follows:

> "A. I went into the office.
>
> "Q. And what next, please?
>
> "A. Ms. Thompson had the file and she said there was something wrong with it or something of that nature and she wanted a union representative.

"Q. And your response to that was?

"A. Sir, my response was that that was fine. I will get you one. We will let you know when a union representative is available. She continued to debate some of the issues in the 971 and I went over and took the 971 from her hand and said, 'We will curtail this meeting until you get your union representative that you requested.'

[Sic] [Q] When you took the file from her, did you strike her with your fist or hand?

"A. No, sir.

"Q. Did you, to your knowledge, strike her with the file when you took it from her?

"A. Not to my knowledge.

"Q. Did she complain to you?

"A. She made no comment to me whatever.

. . .

"Q. Did you make arrangements then to have Ms. Banik come and discuss the 971 file?

"A. Yes, sir, I did. (Tr. 229-230).

4. Ms. Banik testified, in part, as follows:

"A. It was about 7:30 and I was over at the N.C.O. Club doing a cash count and Mr. Little called me and said could I attend a meeting as a representative for Janet Thompson.

"Q. And what did you say?

"A. I said I couldn't come until around ten o'clock that morning because I had to finish the cash count on the N.C.O. Club.

"Q. What did Mr. Little say?

"A. He said that would be fine.

"Q. Thereafter did you go over there at ten o'clock?

> "A. Yes, I was there at ten o'clock.
>
> . . .
>
> "Q. And who was there when you got there?
>
> "A. We went into the meeting and there was Mr. Little, Mary Kay Wozna, myself, and Janet Thompson.
>
> "Q. And what occurred in that meeting to the best of your recollection?
>
> "A. Well, we proceeded to review Janet's 971 file." (Tr. 149-150).

5. Ms. Thompson admitted that when Ms. Banik arrived:

> "A. I was immediately given my 971 folder and Jean and I went through it.
>
> "Q. And Mr. Little and Ms. Wozna did allow you to go through it?
>
> "A. Yes, they did." (Tr. 50).

CONCLUSIONS

I credit the testimony of Ms. Wozna that Mr. Little told Ms. Thompson that she could have a Union representative and that he would keep the 971 file until the Union representative came and they could review it then; and I credit Mr. Little's wholly consistent testimony that he told Ms. Thompson that he would get her a Union representative and that he told her "We will curtail this meeting until you get your union representative that you requested." I have credited the testimony of Ms. Wozna and of Mr. Little, in part, because I found each to be a credible witness; in part, because the record shows that Mr. Little immediately called Ms. Banik, Union Vice President and asked her if she could attend a meeting as a representative for Janet Thompson; in part, because the record shows that the request of Ms. Thompson, namely that she have a Union representative present to review the 971 file with her, was, in fact, fully complied with as soon as Ms. Banik was available (10:00 a.m.); and, in part, because I did not find Ms. Thompson's testimony that "And there was nothing said", in response to her request for a Union representative, convincing. Nor did I find her testimony convincing that "They were yelling and I cound no longer see the file" (Tr. 98) or that" ... they were screaming and hollering and I couldn't see the file any more" (Tr. 47). Rather, I find, as both Ms. Wozna and Mr. Little credibly testified, that Mr. Little told Ms. Thompson she could have a Union representative, which is fully corroborated by the fact that he did immediately call Ms. Banik.

As Ms. Thompson's request to see her 971 file had been granted and, as her further request, for "a union representative now so that I can thoroughly go through this file", was also granted and Respondent immediately called the Union representative and arranged for her to be present as soon as the Union representative could be present, Respondent did not violate §16(a)(1) by terminating Ms. Thompson's examination of the file pending arrival of the Union representative.

There is no disagreement that Mr. Little took the file folder from Ms. Thompson. From Ms. Thompson's testimony, it clearly appears that when Mr. Little grasped the folder Ms. Thompson resisted and, holding the folder, raised her arms. It is possible that, when the folder was taken from her grasp, her raising the file upward resulted in the file hitting her under the chin; but if this occurred, and Ms. Wozna and Mr. Little denied that Ms. Thompson was struck either by Mr. Little's hand or by the file, I conclude that any such contact was unintentional and accidental and did not constitute a violation of §16(a)(1). In so concluding, I neither condone nor approve the action of Ms. Thompson in refusing to return the file to Mr. Little or the action of Mr. Little in taking the file from Ms. Thompson, notwithstanding that Ms. Thompson had removed, improperly, at least one document from the file.

Having found that the preponderance of the evidence does not support the allegations of the Complaint, the allegations of Paragraph 4(b), and the portion of Paragraph 5 relating thereto, are dismissed.

II. Case No. 7-CA-733

A. Paragraph 4 of the Complaint alleges:

> "On or about June 12, 1980, the Respondent, acting by and through John R. Little ...:
>
> "(a) threatened two unit employees with termination of their employment because they contacted a Union officer; and
>
> "(b) told them that they should come to him with complaints if they wanted to continue their employment." (G.C. Exh. 2 (e)).

1. On May 22, 1980, Linda Campbell and Judy Bailey talked to Ms. Thompson about pay scales and job posting and she referred them to Ms. Banik and they talked to Ms. Banik. Neither employee told any management official of their discussion with either Ms. Thompson or Ms. Banik.

2. On June 12, 1980, Ms. Campbell and Ms. Bailey again talked to Ms. Thompson about a pay matter and she again referred them to Ms. Banik. Ms. Banik suggested that they call Carol Pengra at Civilian Personnel, which they did, and they made an appointment to meet with Ms. Pengra the

following day, June 13. Neither Ms. Bailey nor Ms. Campbell informed any management official that they had contacted either Ms. Thompson or Ms. Banik. Both Ms. Campbell and Ms. Bailey stated that Ms. Pengra informed them that Mr. Little would have to be present on the 13th.

3. Either Ms. Pengra or her secretary called Mr. Bud Torp, Non-Appropriated Fund Personnel Coordinator, on June 12 and advised him that Ms. Campbell and Ms. Bailey had an appointment with her on June 13. Mr. Torp, in turn, called Mr. Little to advise him of the scheduled meeting and to determine the nature of the meeting. Mr. Little had no knowledge of the meeting nor why the employees had requested the meeting. (Tr. 168-169, 233).

4. Shortly before the end of their shift on June 12, Mr. Little called Ms. Campbell and Ms. Bailey to his office to inquire as to the purpose of their meeting with Ms. Pengra.

5. The testimony of Ms. Campbell and Ms. Bailey and that of Ms. Thompson as to what Bailey and Campbell told her (Tr. 394, 431, 57) does, as Respondent notes in its Brief, illustrate "an incredible indenticalness in wording, phraseology, and order of topics covered" (Respondent Brief, p. 13), which is more suggestive of a rehearsed script than recollection faithfully recalled. I do not credit their testimony[6/] and specifically their reference to "calls from the union", in part, for the reason set forth above, in part, because I found Mr. Little's testimony far more credible; but more directly because there is no support whatever for their assertions and the affirmative evidence is wholly to the contrary. First, neither Campbell nor Bailey was a member of the Union. Second, both Bailey and Campbell stated that they never told anyone in management that they had talked to either Ms. Thompson or Ms. Banik, nor did they mention Ms. Banik in their conversation with Ms. Pengra. Third, only Mr. Torp was shown to have called Mr. Little. Fourth, Mr. Little testified without contradiction that neither Campbell nor Bailey made any reference to their having contacted the Union (Tr. 233) and Mr. Little

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[6/] Ms. Campbell testified, in part, as follows:

> "... that he was damn tired of getting calls from the union, from Carol Pengra, the civilian personnel, the Major and some attorney running around who didn't have half the facts ...." (Tr. 394).

Ms. Bailey testified, in part, as follows:

> "... that he was getting damn sick and tired of getting calls from the union and civilian personnel and the Major and some attorney running around who didn't have all the facts ..." (Tr. 431).

further testified that he was not aware that they had contacted a Union representative (Tr. 233). Fifth, Mr. Little specifically denied having made the statements attributed to him (Tr. 171-173).

Nevertheless, I find, as Mr. Little testified, that he began the meeting with Ms. Campbell and Ms. Bailey by stating (not necessarily in this order): (a) that if they had any complaints they should come to him first and further that he told then "... that if I couldn't satisfy their problem that they were perfectly free to go to the next level supervisor or commander, whenever they wished." (Tr. 174); and (b) that he told Ms. Bailey "... that she had some incidents on the weekend" and that he had thought about terminating her "but I was not taking any action." (Tr. 173). Mr. Little specifically denied that he said they should come to him first with their problem if they wanted to continue their employment (Tr. 174).

6. Ms. Campbell and Ms. Bailey did not keep their appointment with Ms. Pengra.

CONCLUSIONS

Mr. Little testified that he was not aware that Ms. Campbell or Ms. Bailey had contacted a Union representative and the record is devoid of any evidence that he knew, should have known, or even could have known, they they had contacted any Union official. Therefore, I fully credit Mr. Little's denial that he made any reference to the Union and/or that he made any statement concerning their having contacted a Union officer or representative. Accordingly, because the preponderance of the evidence does not support the allegation of Paragraph 4(a) of the Complaint, the allegations in Paragraph 4(a), and the portion of Paragraph 8 relating thereto, are hereby dismissed.

General Counsel does not dispute the reality of Respondent's "Chain of Command" policy. Mr. Little specifically denied that he said that they should come to him first with their problems if they wanted to continue their employment, i.e., while Mr. Little admitted that he told them they should come to him first and if he couldn't satisfy their problem they could then go to the next level of supervision, he denied that he threatened termination of their employment if they did not. However, even if it were assumed that termination of employment was implicit in his statement if they did not observe the "Chain of Command" and initiate all inquiries or problems with him, such threat, whether express or implied, did not violate §16(a)(1) of the Statute. §2 assures the right of each employee "to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal ....", but, of course, assures no right for employees to ignore, or to refuse to comply with, agency or activity procedures. Here, two employees, Campbell and Bailey, had, without initiating their inquiry with Mr. Little, directly contacted Personnel. Such action simply did not involve any right protected under the Statute and, conversely, any threat by Mr. Little for their failure to comply with the "Chain of Command" did not constitute an unfair labor practice in violation of §16(a)(1). Nor does it matter that they were advised by a Union representative, Ms. Banik, to contract Ms. Pengra directly. No basis for a violation of §16(a)(1) exists unless there is interference, restraint, or coercion in the exercise by the employee of any right assured by the Statute. Not only was their failure to observe the "Chain of Command" not a protected right under the Statute, but, for reasons set forth above, the record is devoid of evidence that Mr. Little knew, should have known, or even could have known, that they had contacted any Union representative. Accordingly, as the record shows no basis for a violation of §16(a)(1) even if Mr. Little told Ms. Campbell and Ms. Bailey that "they should come to him with complaints if they wanted to continue their employment" as alleged in Paragraph 4(b), the allegations of Paragraph 4(b) of the Complaint, and the portion of Paragraph 8 relating thereto, are hereby dismissed.

B. Paragraph 5 of the Complaint alleges:

> "On or about July 9, 1980, Respondent, acting by and through Mary K. Wozna ... breached the applicable collective bargaining agreement by requiring three unit employees, Charging Party Janet Thompson, Linda Campbell, and Judy Bailey, to use a chemical cleaning compound for a purpose for which it was not intended, because of said employees' Union activity." (G.C. Exh. 2(e)).

1. The portion of the collective bargaining agreement asserted to have been breached is Article 19, Section 1, which provides as follows:

> "Section 1. The Employer shall make every reasonable effort to provide and maintain safe working conditions for employees." (Jt. Exh. 1).

2. Ms. Wozna testified that she was on leave for approximately three weeks from the first of June; that when she returned she inspected the rooms and found them "... very, very dirty. Especially the showers were filthy ... There was scum built up on the bottom of the showers. They were just awful." (Tr. 336).

3. With knowledge that various of her employees, including Cora Rehome, Chong Springer, Rosemarie Mazzell, Bruce Fraser and Brian Olson, used Per Diem to clean showers to remove such scum (Tr. 338), Ms. Wozna testified, without contradiction, that on July 8, 1980, she and Bruce Fraser spent nearly the entire day cleaning showers on the third floor with Per Diem and that neither she nor Mr. Frazer suffered any physical problem from the use of Per Diem in this manner (Tr. 337). Ms. Maria C. (Cora) Rehome testified, without contradiction, that she had used Per Diem to clean showers since her employment at Ellsworth in 1977 and had

never suffered ill effects (Tr. 453-454); that she had shown Ms. Wozna how she used Per Diem (Tr. 455); that other employees with whom she worked, including Chong Springer, Kim, Amy, Cham and Kyong (Tr. 455), used Per Diem in the same manner; and that, to her knowledge, none had suffered any reaction from using Per Diem in this manner (Tr. 455).

4. There is no dispute that on July 9, 1980, Ms. Wozna instructed the three janitors working in Building 1103, Thompson, Campbell and Bailey, to clean the shower stalls with Per Diem and demonstrated to each the technique she had used and that they should follow.

5. Ms. Thompson testified that in completing the shower on which Ms. Wozna had demonstrated the use of Per Diem she "smelled the fumes and ... got lightheaded" (Tr. 61); that when she went to the next shower, "I began to get a headache. I got nauseous. My nose burned. My eyes burned and I did open the windows because I was aware of the strong fumes ...." (Tr. 61); that she re-read the instructions on the label and called her doctor (Tr. 62); that she went down to Ms. Wozna and turned in her keys and checked out; that she went back to the second floor to get her purse; that she than went to the third floor, where Ms. Campbell was working, and saw Ms. Campbell "just sort of staggering out of the room" (Tr. 63); that she screamed, "Somebody come help her"; that she then ran back to the office on the first floor and told Ms. Wozna. "Linda Campbell is up there unconscious from using this Per Diem, I think" (Tr. 63); and "... we all dashed up there, Mr. Little, Ms. Wozna and myself ...." (Tr. 63). Ms. Thompson testified that someone told her to '"... sit down or lay down' because I was wobbly." (Tr. 64); that she sat down but got up and went to the bathroom and vomited, after which she felt "somewhat better ...." (Tr. 64). Ms. Thompson was taken to the hospital but her examination "revealed essentially normal exam" (Res. Exh. 7) and she was released the same day; however, she remained off work for two and a half weeks (Tr. 64).

6. Ms. Bailey testified that after completing the shower on which Ms. Wozna demonstrated the use of Per Diem she started another, "... but I -- I don't know -- I couldn't breathe in there" (Tr. 432) so she had gone to Ms. Wozna and told her she wasn't going to use it, that she couldn't breathe with it; that Ms Wozna said, "Well, you're probably using too much" and came back with her and again squirted Per Diem on the shower and said to let it set and then scrub it and run it off with hot water; that she finished that shower but didn't use Per Diem any more (Tr. 432). Ms. Bailey further testified that she "... heard Janet Thompson run down the stairs screaming that Linda Campbell was on the third floor unconscious" (Tr. 433); that Mr. Little, Ms. Wozna. Janet Thompson and she "all ran upstairs" and she saw Ms. Campbell lying on a bed (Tr. 433); that "these guys" were working on Ms. Campbell; and then it started getting crowded in there and she, Bailey, went back to the first floor and continued working (Tr. 433).

7. Ms. Campbell testified that Ms. Wozna demonstrated the use of

Per Diem; that on the third shower she "... was very nauseated and on the fourth one ... I only poured the full strength Per Diem in there and I barely made it to my maid's cart. I was so sick and Ms. Thompson came down the hall and said she had turned in her keys, that she was going on sick leave and going to her doctor. And I asked her to help me and she said that she couldn't help me because she was sick herself." (Tr. 396). Ms. Campbell was rendered assistance by several Air National Guard Firemen, quartered on the third floor, who were at Ellsworth for two weeks active duty training.

8. Mr. Duane Kantowski, one of the Firemen who assisted Ms. Campbell, testified that "... two of the three men that were helping her started becoming dizzy while in the hallway. We found a bucket of cleaning fluid diluted with water ...." (Tr. 361). Mr. Kantowski further testified:

> "A. I began to get dizzy myself.
>
> "Q. In the hallway?
>
> "A. Yes, sir. We were next to the cart, sir.
>
> "Q. Could you tell me what was on the cart?
>
> "A. A bucket diluted with cleaning agent.
>
> "Q. Do you know what the cleaning agent was in the bucket?
>
> "A. Not for a fact, sir.
>
> "Q. And it was diluted with water?
>
> "A. Yes.
>
> "Q. And you were inhaling that; is that what you are saying? Did you smell it?
>
> "A. Yes, sir.
>
> "Q. And your inhaling of whatever was in the bucket caused you to be dizzy?
>
> "A. Yes, sir." (Tr. 367-368).

Mr. Kantowski stated that Per Diem smelled like the substance in the bucket, "But it wasn't as strong" (Tr. 371). Indeed, at the hearing, Mr. Kantowski, after being asked to smell a bottle of Per Diem, testified that "It smells like detergent" (Tr. 371), did not have a strong odor to him (Tr. 371), and "That the fumes given off from the bottle aren't as much as were given off from the bucket." (Tr. 373).

9. Mr. Gerald Roy Chapa, former Staff Sergeant, Wisconsin Air National Guard, one of the first to reach Ms. Campbell, testified, in part, as follows:

> "...The four of us anyway began to notice a strong odor. Some of them complained that they weren't feeling too good either so we checked to see where the odor was coming from, which it was coming from a bucket on one of the cleaning carts and we checked the odor against what was in the bottle by holding the bottle away from us and determining it was the same solution. So we proceeded to take the bucket and dump it down the john ...." (Tr. 379-380).

Mr. Chapa, after being asked at the hearing to smell a bottle of Per Diem,[7] stated:

> "A. It is the same stuff.
>
> "Q. And which is the odor, please?
>
> "A. Well, it is not as strong as it was before.
>
> "Q. Before what?
>
> "A. Well, like what was in the bucket, the odor was stronger.
>
> "Q. The odor was stronger in the bucket even though it was diluted with water?
>
> "A. Yes." (Tr. 387).

10. Ms. Campbell specifically, and directly, testified that she had

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[7] Noting that Mr. Chapa rather violently withdrew his nose from the vicinity of the bottle of Per Diem, after quite gingerly undertaking to smell it, a reaction not shown by Mr. Kantowski, I personally smelled the bottle of Per Diem and could detect no strong odor either from breathing deeply from the bottle, from a water glass, into which I poured Per Diem, or after adding water to the glass containing Per Diem. (Tr. 389, 517). Nor did I experience any burning of my eyes or nose. I do not consider this as evidence and place no reliance on my personal action beyond confirming to my own satisfaction that, as Mr. Kantowski testified, Per Diem does not have "a strong odor".

no bucket with any cleaning material whatever. She testified in this regard as follows:

> "A. I didn't have a bucket.
>
> "JUDGE DEVANEY: You had no bucket.
> "A. No. No bucket with Per Diem.
>
> "JUDGE DEVANEY: Did you have a bucket with something else?
>
> "A. With just water.
>
> "JUDGE DEVANEY: Just plain water?
>
> "A. That's correct.
>
> "JUDGE DEVANEY: And it had no cleaning material in it whatsoever?
>
> "A. No, sir.
>
> "JUDGE DEVANEY: Now, on July 9th had you used Vani-Sol[8] for any purpose?
>
> "A. Just only for the commode. You mean on July 9th?
>
> "JUDGE DEVANEY: Yes.
>
> "A. No, sir.
>
> "JUDGE DEVANEY: You had not used it at all?
>
> "A. No, sir.
>
> "JUDGE DEVANEY: And you didn't have a bucket that contained Vani-Sol; is that correct?
>
> "A. That's correct." (Tr. 425-426).

11. Ms. Campbell was taken to the hospital, her examination was also "essentially normal" (Res. Exh. 8), chest x-rays were taken, she was released the same day, and reported for work on July 10, 1980 (Tr. 396);

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[8] Per Diem contains 8 percent Hydrogen Chloride (G.C. Exh. 6). Vani-Sol, a quite different product, although made by the same manufacturer, contains 23 percent hydrogen chloride (Tr. 388).

however, she testified that on the evening of July 10, 1980, she felt ill and had gone to the Rapid City Regional emergency room (Tr. 416).

12. Captain Randall Ostraat, a Board Certified Industrial Hygienist (Tr. 484), testified that the symptoms of over-exposure to hydrogen chloride are: burning of the eyes, nose and throat, the gas being an upper respiratory irritant; that it is not a narcotic and would probably not make a person dizzy nor is it likely to make a victim nauseous (Tr. 487, 496). He further testified that the use of Per Diem would not have any "build-up" effect as hydrogen chloride is not a sensitizing agent (Tr. 497). To test Per Diem for the presence of hydrogen chloride gas in the air when used to clean showers, he had Ms. Wozna clean two showers on the third floor of Building 1103 (Pine Tree Inn), one dark shower and one light shower, with the windows closed and, while Ms. Wozna scrubbed the floor, he took air samples at the breathing zone (nose and mouth levels) using a Drager detector tube. After testing the air samples, no measurable quantity of hydrogen chloride gas was found. He further testified that the threshold limit value for hydrogen chloride, used by industrial hygienists, is five parts per million (Tr. 490).

CONCLUSIONS

Not every breach of contract is an unfair labor practice. General Services Administration, Region 5, Public Building Service, Chicago Field Offices, A/SLMR No. 528, 5 A/SLMR 424 (1975); and, of course, the Statute, like Executive Order 11491, as amended, from which it evolved, is very limited; it does not seek to right all wrongs; and conduct may be highly objectionable and still not violate in any manner its provisions. cf., Internal Revenue Service, A/SLMR No. 897, 7 A/SLMR 782 (1977). Disavowal of a contractual obligation was held to constitute a violation of Section 19(a)(1) of the Executive Order, Army and Air Force Exchange Service, South Texas Area Exchange, Lackland Air Force Base, Texas, A/SLMR No. 669, 6 A/SLMR 316 (1976), and would violate the wholly like provisions of §16(a)(1) of the Statute, and/or, if sufficiently flagrant and presistent, a unilateral change in the contract in violation of §16(a)(5); or "a breach of contract prompted by anti-union motivation to discourage union membership ... would violate Section 19(a)(2); or a breach of contract motivated by considerations in violation of Section 19(a)(4) ....", General Services Administration, Region 5, supra, 5 A/SLMR 424, 427 n.5, which observations would be equally applicable to the substantially identical provisions of §§16(a)(2) and (4) of the Statute.

The record here does not show any knowing or intentional breach of the contractual provision, that "The Employer shall make every reasonable effort to provide and maintain safe working conditions for employees", by Ms. Wozna's instructions to Thompson, Bailey and Campbell to use Per Diem to clean showers. Indeed, without expressing any opinion as to the ultimate wisdom of her decision, Ms. Wozna demonstrated both prudence and fidelity to the contractual admonition to "... make every reasonable effort to provide and maintain safe working conditons ...." before instructing employees to use Per Diem to clean showers. First, she knew that numerous employees had used Per Diem to clean showers, notwithstanding that it is a toilet bowl cleaner, and that they had found it both effective and safe over a period of years. Second, before instructing any employee to use Per Diem to clean showers, she, personally, spent nearly a full day on July 8, 1980, using Per Diem, in precisely the manner she subsequently instructed Thompson, Bailey and Campbell to use it, and, also, found it both effective and wholly free of any ill effects on her or the employee who worked with her.

It is not necessary to decide, and I do not decide, whether the use of Per Diem to clean showers was, in fact, safe. I do, however, conclude that: (a) the preponderance of its evidence fails to show that the use of Per Diem for this purpose was unsafe, indeed, that the affirmative evidence indicates that it was safe; and (b) the preponderance of the evidence strongly indicates that whatever ill effects Ms. Campbell or Ms. Thompson suffered were attributable principally, if not entirely, to something other than their use of Per Diem. I view with skepticism Ms. Thompson's testimony that in using Per Diem she "smelled the fumes and ... got lightheaded" and when she went to the next shower she "began to get a headache", and "got nauseous", in part, because a test of Per Diem showed no measurable quantity of hydrogen chloride gas when used in this manner; in part, because, as Captain Ostraat testified, while hydrogen chloride is an upper respiratory irritant, it is not a narcotic and if present in the air would probably not make a person dizzy nor is it likely to make a victim nauseous; and in part, because, as Mr. Kantowski testified, and as I personally observed, Per Diem does not have a strong odor. In any event, nothing in her actions (making a telephone call, going to the first floor and checking out, returning to the second floor for her purse, going to the third floor, etc.) shows that when she arrived on the third floor she was then "wobbly", nor does her running to the first floor and then returning to the third floor. That she became "wobbly" while on the third floor and went to the bathroom and vomited would appear, in view of the testimony of Messrs. Kantowski and Chapa concerning the reaction of two or three of the men assisting Ms. Campbell, to have been attributable to the contents of the bucket on Ms. Campbell's cleaning cart and not to Per Diem. The record does not show what the bucket contained; but whatever it contained, both Mr. Kantowski and Mr. Chapa agreed that, even diluted with water, the odor was stronger from the bucket than Per Diem and, indeed, Mr. Kantowski testified that Per Diem did not have a strong odor.

I do not question that Ms. Campbell fainted and, although she attributed her nausea and dizziness to Per Diem, her physical reaction would be more consistent with a reaction to the contents of the bucket on her cleaning cart than with a reaction to Per Diem. As noted, Messrs. Kantowski and Chapa testified that two or three of the men, when they went into the hallway to assist Ms. Campbell, became dizzy and "weren't feeling too good" as the result of the material in the bucket on Ms.

Campbell's cleaning cart. Ms. Campbell testified that she had not put anything but water in any bucket. Nevertheless, a bucket containing some substance, which produced fumes sufficiently strong to make two or three men dizzy and to feel ill almost instantly, was present and if it caused an identical reaction in others, it is reasonable to infer that it caused the reaction of both Ms. Campbell and Ms. Thompson. The evidence that such reaction as suffered by either Ms. Campbell and Ms. Thompson resulted from Per Diem is to the contrary. Thus, for example, other employees over a long period of time had used Per Diem with no ill effects; a test, using Per Diem to clean two showers, showed the presence of no measurable hydrogen chloride gas; hydrogen chloride, by its nature, if present, would probably not cause dizziness or nausea; and, although Ms. Bailey testified "... I couldn't breathe in there" when she was using Per Diem, she experienced no reaction like either Ms. Campbell or Ms. Thompson. Consequently, the overwhelming preponderance of the evidence points to the contents of the bucket on Ms. Campbell's cleaning cart, which clearly was not Per Diem alone, as the cause of the ill effects suffered by Ms. Campbell and by Ms. Thompson.

Finally, the allegation of the Complaint that Ms. Wozna instructed Thompson, Bailey and Campbell to use Per Diem because of their Union activity was, and is, so utterly lacking in basis as to approach the absurd. The record shows that Ms. Wozna's instruction was given to all the janitors in Building 1103 because, upon her return from leave, she found the showers in Building 1103 filthy as the result of the build-up of scum. She was aware that various other janitors used Per Diem to remove such scum and that they had found it safe; nevertheless, she personally used Per Diem for this purpose on July 8 and found it both effective and safe. Accordingly, on July 9, she instructed Thompson, Campbell and Bailey to use Per Diem and demonstrated its use to each. Not only does the record wholly fail to show that any other factors were considered by Ms. Wozna in instructing Thompson, Campbell and Bailey to use Per Diem than: (a) the condition of the showers; (b) that Per Diem was effective in removing accumulated scum; and (c) that Per Diem was safe to use in this manner, as she had personally determined; but neither Ms. Campbell nor Ms. Bailey was shown ever to have engaged in any Union activity. Even if this most considerable deficiency were ignored, any argument that her instructions were discriminatorily motivated is firmly refuted by the fact that Ms. Wozna herself had used Per Diem in precisely this manner the preceding day, July 8, 1980, and on July 9 she personally demonstrated to each employee how to use Per Diem.

Accordingly, as the preponderance of the evidence fails to show that Respondent breached the applicable collective bargaining agreement; that its instruction to use Per Diem to clean showers was discriminatorily motivated; or that it abrogated or changed in any manner the terms of the applicable collective bargaining agreement, the allegations of Paragraph 5 of the Complaint, and of Paragraph 9 of the Complaint relating thereto, are hereby dismissed.

C. Paragraph 6 of the Complaint alleges:

> "On or about July 10, 1980, Respondent, acting by and through John R. Little and Mary K. Wozna ... terminated the employment of Linda K. Campbell because of the exercise of rights granted by the Statute." (G.C. Exh. 2(e)).

1. Ms. Campbell had been hired on July 27, 1979, as an Intermittent on Call (I.O.C.), grade NA-1. In January 1980, Ms. Campbell quit her job with Billeting to accept a full-time position, NA-2, as janitor at the Base Nursery (Tr. 332); however, after one day she quit and told Ms. Wozna "she just couldn't do the work, that it was too hard, and she was sick and she had to lay down and she almost fainted, so I called her husband to come after her ...." (Tr. 332-333). Ms. Campbell asked Ms. Wozna for her old job and she was re-employed as a NA-1 Intermittent employee.

2. Effective June 8, 1980, Ms. Campbell became a regular full-time janitor, NA-2 (Probationary) (G.C. Exh. 14).

3. Ms. Wozna very credibly testified that prior to Ms. Campbell being hired as a NA-2 janitor that she:

> "... told her I was concerned whether she would be able to perform the duties as an NA-2 janitor because she had not been able to do it at the nursey and I wanted to be fair with her and give her a chance to see if she could." (Tr. 334).

4. On July 10, 1980, at approximately 3:30 to 3:45 p.m., Ms. Wozna gave Ms. Campbell a letter of separation (G.C. Exh. 12 and 13) effective as of 7:00 a.m. July 11, 1980. After all employees had gone, Ms. Campbell testified that she asked Ms. Wozna if she could speak to her; that Ms. Wozna said "yes"; that she then asked why Ms. Wozna had terminated her; and that Ms. Wozna, replied:

> "... and she said because she hated to do it but I wasn't qualified to do the job as hired and that there was no other alternative ...." (Tr. 397).[9]

---

[9] I am aware that Ms. Campbell further testified that Ms. Wozna stated:

> "... But she also stated that I wasn't the only one that got the shaft, that there were three others and she did not mention any other names." (Tr. 397).

(continued)

CONCLUSIONS

As noted above, the Statute does not seek to right all wrongs and there is no jurisdiction under the Statute to determine whether a separation was proper or improper except to the extent that such separation was "because of the exercise of rights granted by the Statute" as very properly alleged in Paragraph 6 of the Complaint. The glaring deficiency of General Counsel's case is that there simply is no evidence that Respondent knew, or even could have known, that Ms. Campbell ever engaged in the exercise of rights granted by the Statute. General Counsel would relate back to the June 12, 1980, incident, discussed in Paragraph A of this Part II; but for reasons fully set forth therein, the record does not support General Counsel's assertion, i.e., there is no evidence that Respondent knew, should have known, or even could have known, that Ms. Campbell ever talked to Ms. Thompson or to Ms. Banik about any condition of employment. Nor do I find any merit to General Counsel's assertion that Campbell's and Bailey's working conditions "abruptly changed". (G.C. Brief, p. 11). Ms. Campbell and Ms. Bailey testified that Ms. Wozna told them they couldn't take their breaks on the second floor; that we had to take it in the office (Tr. 398, 437). But the inference that General Counsel would draw, namely that they were not to have lunch with Ms. Thompson, is wholly unsupported. Ms. Wozna very credibly testified that she never told Thompson, Bailey and Campbell to stop eating lunch together (Tr. 324); and Ms. Thompson testified that she thereafter had lunch with Ms. Bailey (Tr. 116). Nor is there basis for any asserted change in conditions of employment if, as Ms. Campbell testified, she "... would have ... these jobs to do over that the weekend maids didn't do ...." (Tr. 398).

On the other hand, Ms. Wozna very credibly testified that she terminated Ms. Campbell:

> "Because she couldn't perform the duties of an NA-2 janitor and she had not been performing the duties to my satisfaction.
>
> "Q. Specifically what had she been unable to perform?
>
> "A. The rooms were dirty. The showers were dirty." (Tr. 304-305).

9/ (continued)
Ms. Wozna denied having made any such statement (Tr. 324, 325). However, I do not resolve this conflict for the reason that the record fails to connect this statement, if made, to any action by Respondent. Thus, for example, the record fails to show any other separation by Billeting on, or about July 10, 1980.

Ms. Wozna further testified that she told Mr. Little:

> "... I didn't think she was physically able to perform the duties of an NA-2 janitor. I have discussed it with him." (Tr. 307).

Mr. Little testified that after June 8, 1980, Ms. Campbell had been unable to move furniture on more than one occasion (Tr. 196). I am aware that the date, June 8, 1980, that Mr. Little showed on his addendum to Ms. Wozna's letter of Separation (G.C. Exh. 13) as the date he counseled Ms. Campbell was in error; however the original entry (Attachment to G.C. Exh. 15) does not, so far as I can tell, show the date as the 8th of any month; and the month would appear more probably to have been "July", than June, although this, necessarily, is speculative since the entry is not clear. The date, with two digits, would appear more probably to be a "10". But the issue here is not whether Ms. Campbell was counseled prior to her separation; but whether she was separated because of the exercise of rights granted by the Statute. I find no evidence that Respondent had any knowledge, or reason to believe, that Ms. Campbell had ever engaged in rights granted by the Statute. On the other hand, there is convincing testimony, by both Ms. Wozna and Mr. Little, as to Ms. Campbell's unacceptable performance of duty.

Accordingly, as the preponderance of the evidence fails to support the allegations of Paragraph 6 of the Complaint, the allegations of Paragraph 6, and the portion of Paragraph 10 relating thereto, are hereby dismissed.

D. Paragraph 7 of the Complaint alleges:

> "On or about September 30, 1980, Respondent, acting by and through John R. Little and Mary K. Wozna ... terminated the employment of Judy Bailey because of her Union activity." (G.C. Exh. 2(e)).

1. Ms. Bailey was hired on March 21, 1980, as an Intermittent On-Call employee (G.C. Exh. 18).

2. Ms. Wozna set forth the reasons for her decision in the letter of termination (G.C. Exh. 18). Ms. Bailey admitted she left early on July 8 (Tr. 437) and, from her testimony, it would appear that she did not advise Ms. Wozna, "... so I went, I left ...." (Tr. 437). The distinction, which General Counsel ignores, is that Ms. Wozna permitted employees to leave a few minutes early if they had finished their work and had transportation, but they were not to leave early without permission. In any event, the more significant reasons for Ms. Bailey's termination was that Ms. Wozna had been unable to locate her for work. Three dates, September 15, 16, and 24, were stated in the letter of September 25. Ms. Bailey testified that she was home sick on September 15 and received no call; however, she testified she didn't know whether

she was at home on September 24 and admitted she was not at home on September 16 (Tr. 438). I am aware that Ms. Bailey stated that she was "in billeting" on September 16, but I am equally aware that she did not say she saw Ms. Wozna. Ms. Mannie Hansen testified that she overheard a conversation on September 16 between Ms. Wozna and Mr. Little in which Ms. Wozna said, "'I tried to call Judy Bailey but she refused to come in.'" (Tr. 449). I have reservations as to whether what Ms. Hansen asserted she overheard was an accurate reflection of any conversation Ms. Wozna may have had; but more directly, it fully corroborates the fact that Ms. Wozna called Ms. Bailey. Of course, Ms. Wozna did not assert, either in her letter of September 25 (G.C. Exh. 18) or in her testimony, that Ms. Bailey had ever refused to come in, and, accordingly, it is unnecessary to resolve the credibility of Ms. Hansen's further assertion that she heard Ms. Wozna say that Ms. Bailey refused to come in; however, I am aware that Ms. Wozna testified that she did not recall telling anyone that Ms. Bailey, on one of the dates stated, refused to come in (Tr. 321).

CONCLUSIONS

The deficiency of General Counsel's case as concerns Ms. Bailey, as was true as to Ms. Campbell, is that there is simply no evidence that Respondent knew, or even could have known, that Ms. Bailey ever engaged in Union activity. Again, General Counsel would relate back to the June 12, 1980, incident, discussed in Paragraph A of this Part II. For reasons previously stated, the record does not show that Respondent knew, should have known, or ever could have known, that Ms. Bailey ever talked to Ms. Thompson or to Ms. Banik about any condition of employment prior to their personally contacting Ms. Pengra on June 12, 1980. Indeed, Ms. Bailey was quite specific that she saw Ms. Banik, on each ocassion, on her lunch hour; that she did not tell either Ms. Wozna or Mr. Little (Tr. 444) and that she personally called Ms. Pengra (Tr. 430). This is the only matter General Counsel points to as constituting her asserted "Union activity".[10] General Counsel's assertion that Campbell's and Bailey's working conditions "abruptly changed" (G.C. Brief, p. 11) was previously discussed as to Ms. Campbell. I am aware that Ms. Bailey testified, "... my hours were cut down to nothing and it seems like she was always watching me more closely and everything." (Tr. 436). There was no substantiation offered to support either assertion and, to the extent any inference may be drawn, the record is to the contrary. Thus, Ms. Bailey testified that "Ms. Wozna always had me work weekends" (Tr. 445) which would indicate a continued practice through July 1980; that when she reported on August 2, not having been told to report but, also, not having been told not to report, she testified that Mr. Little, "said to go ahead and let me stay since I was already there" (Tr. 446), which, of course, does not demonstrate that Mr. Little bore any ill feeling toward Ms. Bailey.

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[10] I am aware that the record show that Ms. Bailey met with Ms. Thompson on another matter on September 25, 1980, and that she designated Ms. Thompson as her representative (G.C. Exh. 11). However, as the record shows that the letter of termination (G.C. Exh. 18) was issued prior to the meeting and/or submission of the designation, such subsequent activity, obviously, played no part in Ms. Wozna decision.

Again, the issue here is not whether Ms. Bailey was terminated for good cause, but, rather, whether she was terminated "because of her Union activities" and I find no evidence that Respondent had any knowledge, or reason to believe, that Ms. Bailey had ever engaged in "Union activities". On the other hand, the record shows that Ms. Wozna's decision was based solely on grounds wholly unrelated to protected activity.

Accordingly, as the preponderance of the evidence fails to support the allegation of Paragraph 7 of the Complaint, the allegations of Paragraph 7, and the portion of Paragraph 10 relating thereto, are hereby dismissed.

III. Case No. 7-CA-878

A. Paragraph 4(a) of the Complaint alleges:

> "(a) On or about November 21, 1980, the Respondent, acting by and through John R. Little ... instructed employee Janet Thompson to clean approximately 23 rooms in reprisal for her filing of charges and giving information under the Statute, and her Union activity." (G.C. Exh. 3(d)).

For reasons set forth hereinafter, the allegations of Paragraph 4(a) are wholly without merit.

1. On November 21, 1980, Mr. Little was advised of the imminent arrival of an Inspector General's team for which housing for about 79 individuals would be required. Because this was a "no notice" inspection, Mr. Little was advised only 30 minutes prior to the estimated landing time of the plane. As the team would have to be billeted by Mr. Little, either in the Pine Tree Inn (Building 1103) or in private motels, Mr. Little went to Ms. Wozna's office to inform her of the requirement, but she was absent from the building. From the room status board, Mr. Little noted that several rooms would be available on the second floor of Building 1103 because of the departure of two air crews (Tr. 212).

2. Mr. Little went to the janitor on the first floor and asked her to come to the second floor and assist Ms. Thompson as soon as she finished the room she was working on (Tr. 238).

3. Mr. Little then went to the second floor and told Ms. Thompson, the second floor janitor:

> "... we have some people coming in. We need to get the check-outs done first ...." (Tr. 216).

Mr. Little stated that before he could complete his statement to her, Ms. Thompson said she couldn't do it, and that he said:

> "... Janet, will you please let me finish, (Tr. 216) ... Janet, will you listen to me a minute, please. We have people coming up to help you. The maid from the first floor is going to come up and I am going to bring the one down from the third floor ...." (Tr. 218).

Ms. Thompson's version was as follows:

> "A. It was about eight o'clock and Mr. Little came up to the second floor. He was using a voice louder than usual and he said, 'Janet, I want these check-outs done and I want them done in the next couple of hours. I have people coming in.' And I said, 'Oh, I can't do them check-outs in the next couple hours, Mr. Little.' He said, 'I want those check-outs done and I want them done in the next couple hours. I need those rooms.' ...." (Tr. 71).

On cross-examination, Ms. Thompson testified, in part, as follows:

> "A. My response was he asked -- he didn't ask me he was talking very loud. He told me he wanted the check-outs done.
>
> "Q. Did you find that offensive that he told you that?
>
> "A. No, not at all, other than the tone of his voice that he was using.
>
> "Q. So you objected to the tone of voice?
>
> "A. I didn't object to anything at that point. I was stunned. I knew how many check-outs I had, twenty-three from my sheet and I said, 'Well, I just couldn't do it.'" (Tr. 111).

Ms. Thompson denied that Mr. Little told her that people were coming to help (Tr. 72); but admitted that shortly after her conversation with Mr. Little, Ms. Amy Greer arrived and helped until noon; that a half hour or so later, Ms. Wozna arrived and brought Ms. Donna Gent and Ms. Sandy Freeman was taken from linen and after lunch, Ms. Kyong Pharris came and helped (Tr. 73).

4. General Counsel Exhibit 7 is a list Ms. Thompson made showing the work to be done on November 21. Occupied rooms are designated "OCC"; occupied rooms requiring a change of linen are designated "CL"; check-outs are designated "CO". The exhibit shows that Mr. Little arrived at 8:05 and Ms. Thompson stated that it "says that I have done rooms 10-11. I was -- I had the doors open in 12 and 13 and that I was working in room 13," (Tr. 73). In each instance, to conform to the numbers shown on G.C. Exh. 7, a "2" must be added, i.e. room 10 was, actually, room 210, etc. No explanation was given as to the status of rooms 200 through 209 as of 8:05 a.m. Although Ms. Thompson stated that Ms. Wozna indicated empty rooms by no designation, Ms. Thompson's list, G.C. Exh. 7, showed no empty rooms. Since Ms. Thompson had begun with Room 210, a reasonable inference would be that rooms 200, 201, 203, and 209, designated as "CO", were, in fact, empty; but, in any event, at the time of Mr. Little's arrival there were not 23 check-outs to be done, since as Ms. Thompson testified, at least rooms 210 and 211 had been completed.

CONCLUSIONS

I found Mr. Little's testimony far more credible than Ms. Thompson's and conclude that he did tell Ms. Thompson that people were coming to help her; but even if he had told Ms. Thompson, as she asserted, only that " I want these check-outs done and I want them done in the next couple of hours. I have people coming in", no conceivable basis for a violation of §§16(a)(1), (2), or (4) was shown. It borders on the absurd to assert that a supervisor's instruction that an employee perform that employee's regular, routine and normal duties was somehow "in reprisal for her filing of charges and giving information under the Statute, and her Union activity". Ms. Thompson was the janitor assigned to the second floor of Building 1103 and preparing rooms for occupancy after check-out was part of her normal, routine duty. Certainly, instructing Ms. Thompson to do her check-outs first was not an unfair labor practice.

As noted above, I credit Mr. Little's testimony that he told Ms. Thompson, "... we have some people coming in. We need to get the check-outs done first ... We have people coming up to help you ...." But even if he had told her only that, " I want these check-outs done and I want them done in the next couple of hours. I have people coming in", neither the number of check-outs to be done nor the asserted admonition that "I want them done in the next couple of hours" constituted an unfair labor practice since, obviously, Mr. Little's instruction did nothing to interfere with Ms. Thompson's exercise of any right protected under the Statute and the record contains no evidence whatever that such instruction discriminated against Ms. Thomspon in connection with any condition of employment or that such instruction was given to discipline or otherwise discriminate against Ms. Thompson for any reasons, much less because she had filed a complaint, affidavit, or petition, or had given any information or testimony under the Statute. Indeed, the evidence is wholly to the contrary. Not only is there no dispute that Ms. Thompson was told to do the check-outs in question for the sole reason that they were on her assigned floor, but it is equally undisputed that other janitors were provided to assist Ms. Thompson, the first arriving shortly after Mr. Little's conversation with Ms. Thompson.

Accordingly, as the preponderance of the evidence fails to support the allegations of Paragraph 4(a) of the Complaint, the allegations of Paragraph 4 (a), and the portion of Paragraph 5 relating thereto, are hereby dismissed.

B. Paragraph 4(b) of the Complaint alleges:

> "(b) On or about November 21, 1980, the Respondent, acting by and through John R. Little ... told an employee that her request for Union representation constituted insubordination and that she would be cited for it." (G.C. Exh. 3(d)).

1. Mr. Little testified, in part, as follows:

> "A. I told her there was some rooms -- that we had a team coming in and before I could finish my statement or anything she became argumentative and she said she wanted a union representative -- no, I will rephrase that. She demanded that I get her a union representative. And I told her that if you wanted a union representative that she could get one. I tried to explain to her that -- I said, 'Janet, will you listen to me a minute, please. We have people coming up to help you ....'' (Tr. 218).

. . .

> "Q. And you have testified that Mrs. Thompson asked for or demanded union representation? Do you remember how many times she said that or asked for that?
>
> "A. She was a little argumentative and I think she probably demanded it a couple times and I told her it was not my job to get her a union representative, that if she wanted one that she should get one.
>
> "Q. Do you remember whether she mentioned during this discussion between the two of you that she felt you were harassing her by this request?
>
> "A. I don't remember any statement of that nature, sir.

> "Q. ... Do you recall whether either of the times that she asked for a union representative, that you said something like, 'That is insubordination and I will cite you for it,' or something like that? Could you have said it?
>
> . . .
>
> "A. I may have said that she was insubordinate and that I was giving her work assignments or something of that nature, but nothing about the union.
>
> "Q. Okay. Well, I didn't ask if you asked about the union, but you may have said something about the subordination (sic) -- and I missed the last part of that, what was that again?
>
> "A. I said I was giving her a work assignment and she was insubordinate.
>
> "Q. Did you say anything like you could write her up or cite her?
>
> "A. I may have said she could be cited for it, yes, sir." (Tr. 219-221).

2. Ms. Thompson testified, in part, as follows:

> "... And I said, 'Mr. Little, I will do the very best I can. I am working on them right now. I will do as many as I can.' And he said, 'I want them done and I want them all done,' and I said, 'Mr. Little, I think this is a grievance. You are harassing me.' And he pointed his finger at me and he said -- I said, 'I want a representative,' and he said, 'That is insubordination and I will cite you for that.' And I said, 'Well, I do want a representative.' And he said, 'I will not have a representative of the union here. I don't have to talk to her. And I want these rooms done.' And I started to walk down the hallway and I was going to call Jean and he said, 'Now you understand this, I want all of these check-outs done and I mean all of them.'" (Tr. 71-72).
>
> . . .
>
> "A. ... He told me he wanted the check-outs done.
>
> . . .

> A. I didn't object to anything at that point. I was stunned. I knew how many check-outs I had, twenty-three from my sheet and I said, 'Well, I just couldn't do it.'
>
> . . .
>
> "Q. You then demanded a union representative?
>
> "A. No, not at that point.
>
> "Q. I am sorry; at what point did you?
>
> "A. When I told him several times that I couldn't get them done, all of them done in two hours and I finally said, 'Well, I think this is a grievance. You are harassing me. I'll do what I can, as many of them as I can, but I believe you are harassing me. I want a representative.'" (Tr. 111-112).

CONCLUSIONS

For reasons set forth above, I have credited, and do fully credit, Mr. Little's testimony. There is no question that Mr. Little told Ms. Thompson to do the check-outs first and I conclude that Mr. Little did tell Ms. Thompson that people were coming to help her. Nor is there any question that Ms. Thompson protested the work assignment and demanded a Union representative. I further conclude that, as Mr. Little testified, he refused to call a Union representative and told Ms. Thompson if she wanted a Union representative she should get one herself. Nevertheless, Respondent did not thereby violate §16(a)(1) of the Statute, since the issuance of work assignments to employees certainly is not a matter requiring the presence of a Union representative. Nor was Mr. Little's threat to cite Ms. Thompson for insubordination because of her challenging the work assignment rendered unlawful by her request for Union representation. It is, of course, a right of management to assign work and an employee who disagrees with a work assignment does so at the peril of being charged with insubordination, i.e., refusal to comply with a direct order. If an employee refuses to comply with a work assignment and requests a Union representative, he is guilty of insubordination, not because he requested a Union representative, but because he refused to obey a lawful order. If he does not perform the work and requests a Union representative, he is no less guilty of insubordination, again, not because he requested a Union representative but because he failed to comply with a lawful order. Here, Ms. Thompson protested the work assignment, which was a normal and routine portion of her regular duties, and the fact that she contended she "couldn't do it" and requested a Union representative was no less a refusal to obey a lawful order and Mr. Little's threat to cite her was not because she requested a Union representative but because she refused to comply with a lawful order. cf., United States Department of Defense, Department of the Air Force, Field Command Defense Nuclear Agency, Kirtland Air Force Base, New Mexico, 6-CA-488 (ALJ, August 24, 1981).

Ms. Thompson was wholly free to file a grievance if she believed the work assignment were in violation of the parties' negotiated agreement; but the right to file a grievance does not excuse non-compliance with a lawful order.[11]

Accordingly, as the preponderance of the evidence does not support the allegations of Paragraph 4(b) of the Complaint, the allegations of Paragraph 4(b), and the allegations of Paragraph 6 relating thereto, are hereby dismissed.

C. Paragraph 4(c) and 4(d) of the Complaint alleges:

> (c) "On or about November 26, 1980, the Respondent, acting by and through John R. Little ... gave employee Janet Thompson a written, proposed 3-day suspension in reprisal for her filing charges and giving information under the Statute, and for her Union activity.
>
> (d) "On or about December 8, 1980, the Respondent, acting by and through John R. Little ... disciplined Janet Thompson by suspending her from duty on December 10, 11, and 12, in reprisal for her filing charges and giving information under this Statute, and her Union activity." (G.C. Exh. 3(d)).

1. By memorandum dated November 25, 1980, Mr. Little proposed to suspend Ms. Thompson for a period of three calender days "for insubordinate defiance of authority and insolence." (G.C. Exh. 8).

2. The memorandum further stated, in part, as follows:

> "2. On the morning of 21 November 1989, I advised you that I wanted the rooms that were check-outs completed first. There was a large team coming in and I was going to have the workers from the third and first floor help you, as needed the rooms

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[11] This case concerns an order to perform work foursquare within the normal, regular, and routine duties of Ms. Thompson on her assigned floor. No opinion is expressed as to the effect of an order to perform work which would be outside the normal, regular, or routine duties of the employee involved.

> immediately. Before I could complete my instructions you became rude, insubordinate, and argumentive with me about my directions. This action is inappropriate and I believe this suspension will promote the efficiency of this activity." (G.C. Exh. 8).

3. The memorandum provided seven days for a response and Ms. Thompson responded by memorandum dated November 28, 1980 (G.C. Exh. 9). The response was as follows:

> "You are hereby notified that I consider the Proposed Suspension of (3) days a violation procedure of the 40-7 Chapter 10 -- paragraph 10-6. Further the context of the letter does not adhere to the facts." (G.C. Exh. 11).

4. By memorandum dated November 8, 1980, Mr. Little, after noting that,

> "2. You were provided an opportunity to reply to my proposal orally, in written, or both ...
>
> "3. I received your reply on 28 November 1980. I have carefully reviewed your reply on this matter and find that the charges outlined in my letter to you on 25 November 1980 are valid and your suspension is warranted ..." (G.C. Exh. 10).

rendered his decision that Ms. Thompson be suspended for a period of three (3) days beginning 10 December 1980 (G.C. Exh. 10). The memorandum further stated, "... this is not a adverse action, therefore you have no appeal rights. However, if you wish to grieve this decision, under AFR 40-7, you may contact Ms. Thorp, CCPO ... for assistant." (G.C. Exh. 10).

CONCLUSIONS

As previously noted, on November 21, 1980, Ms. Thompson strongly protested Mr. Little's work assignment and I have found that Mr. Little threatened to cite her insubordination. Neither the fact that she had begun check-outs before Mr. Little arrived nor the fact that she eventually resumed work on check-outs alters the further fact that, by her conduct in protesting Mr. Little's instruction, she was insubordinate. On November 25, Mr. Little gave Ms. Thompson notice of a proposed suspension of three days for her conduct on November 21 and on December 8, 1980, after receipt of Ms. Thompson's reply, announced his decision to suspend Ms. Thompson for three days. The issue here is not whether Ms. Thompson should, or should not, have been suspended; but, rather, whether the action was "in reprisal for her filing charges and giving information under the Statute, and for her Union activity" as alleged in the

Complaint. In an effort to show that the proposed suspension was motivated by Ms. Thompson's protected activity, General Counsel relies on a statement Ms. Thompson asserts Mr. Little made to her on November 26, 1980, when he delivered his letter, or memorandum, of proposed suspension. I have given careful consideration to Ms. Thompson's testimony and to that of Mr. Little and do not find Ms. Thompson's testimony credible. Accordingly, I do not credit her testimony, inter alia, that Mr. Little said, "I am not going to get you a Union representative. I will teach you to file charges" or that when she asked to leave, Mr. Little said, "I don't care. You can do as you like." (Tr. 74). Not only did Mr. Little categorically deny that he said "This will teach you to file charges", which denial I fully credit; but I found his testimony concerning the conversation on November 26 wholly credible. Therefore, I fully credit his testimony as follows:

> "Q. Did you say what kind of letter it was?
>
> "A. She opened it and read it.
>
> "Q. What did she say?
>
> "A. She said, 'I want a union representative.' And I said, 'Fine, you are welcome to get one.' And she said, 'May I leave early to go get a union representative?' And I said -- or she said, "May I leave early to go see Jean Banik?' And I said, 'Fine, permission is granted.' She left the office and I called Jean Banik and told her that I had given Mrs. Thompson permission to go over and see her." (Tr. 221).

Mr. Little's testimony that he called Ms. Banik on November 26 was not challenged.

I find no credible evidence that any consideration entered into Mr. Little's proposed suspension, or his decision to suspend Ms. Thompson, except her conduct on November 21, 1980, i.e., the record does not show, either directly or by any reasonable inference, that the proposed suspension, of November 25, or the decision to suspend, of December 8, was in reprisal for any protected activity.

Accordingly, as the preponderance of the evidence does not support the allegations of Paragraphs 4(c) and 4(d) of the Complaint, the allegation of Paragraphs 4(c) and 4(d), and the portion of Paragraph 5 relating thereto, are hereby dismissed.

ORDER

On the basis of the foregoing findings of fact and conclusion of law, I find that Non-Appropriated Fund Instrumentality, Billeting Office, Ellsworth Air Force Base, South Dakota, has not engaged in conduct in violation of Sections 7116(a)(1), (2), (4), or (5) of the Statute. Accordingly, I recommend that the Complaints in this Consolidated case be dismissed in their entirety.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: October 9, 1981
Washington, D.C.

[6-CA-836; 6-CA-903]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF HEALTH
AND HUMAN SERVICES, UNITED STATES
PUBLIC HEALTH SERVICE HOSPITAL

(Respondent)

and

Case Nos. 6-CA-836
6-CA-903

NATIONAL ALLIANCE OF POSTAL AND FEDERAL
EMPLOYEES AND NATIONAL ALLIANCE OF
POSTAL AND FEDERAL EMPLOYEES, LOCAL 106

(Charging Party)

ORDER

The Administrative Law Judge issued a Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in any unfair labor practice as alleged in the consolidated complaint, and recommending that the complaint be dismissed.

No exception to the Administrative Law Judge's Decision and Order was filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (46 Fed. Reg. 40674 (1981)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the consolidated complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., May 13, 1982

James J. Shepard

James J. Shepard, Executive Director

[6-CA-836; 6-CA-903]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

UNITED STATES DEPARMENT OF
HEALTH AND HUMAN SERVICES,
UNITED STATES PUBLIC HEALTH SERVICE
HOSPITAL[1]

Respondent

and

NATIONAL ALLIANCE OF POSTAL AND
FEDERAL EMPLOYEES AND FEDERAL
EMPLOYEES, LOCAL 106

Charging Party

Case Nos. 6-CA-836
6-CA-903

Susan E. Jelen, Esquire
For the General Counsel

George C. Lacy, Esquire
Erie R. Doyle (On Brief)
For the Charging Party

Thomas C. Long
For the Respondent

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code,

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[1] The caption of the Complaint did not identify the particular hospital, nor did any of the subsequent orders issued by the Regional

(continued)

5 U.S.C. §7101, et seq.,[2] and the Final Rules and Regulations issued thereunder, 5 C.F.R. §2423.1, et seq., involves two quite separate cases. Case No. 6-CA-836 was initiated by a charge filed on November 17, 1980 (G.C. Exh. 1(a)) which alleged violations of §§16(a)(1), (2), (4) and (8) of the Statute by the asserted refusal to provide an employee, Mr. William Harrell, with a Union representative, as requested, at an asserted investigative interview. Case No. 6-CA-903 was initiated by a charge filed on December 22, 1980 (G.C. Exh. 1(d)) which alleged violations of §§16(a)(1), (2), (5) and (8) of the Statute by the denial of official time for Mr. William Harrell while engaged in negotiations.

On January 30, 1981, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued (G.C. Exh. 1(g)). As the record shows, Mr. William Harrell is a professional employee and was not in the bargaining unit and, accordingly, the allegation of the charge in Case No. 6-CA-836 that he was denied, as requested, Union Representation at an investigative interview,[3] in the Consolidated Complaint became, instead,[4] an allegation that "... Respondent interfered with, restrained

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(1/ continued)

Director. No motion to amend the caption was made and, accordingly, the style of the case remains as designated in the Complaint, notwithstanding that the caption on the transcript, documents filed by Respondent and the Briefs of all parties, including General Counsel, also add "Nassau Bay, Texas."

[2] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, e.g., 7116(a)(1) will be referred to, simply, as "16(a)(1)."

[3] Section 14(a)(2) provides, in part, as follows:

> "(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at -
>
> . . .
>
> "(B) any examination of an employee in the unit by a representative of the agency ...." (Emphasis supplied).

[4] No question was raised by Respondent with respect to the variance between the charge and the Complaint and I express no opinion whatever with regard thereto as the allegation of the Complaint was fully litigated without objection. Respondent's Motion for More Definite Statement was granted at the commencement of the hearing.

and coerced employees in the exercise of rights guaranteed under Section 7102 ... by the conduct of Dr. Tomas I. Molina in making anti-union statements to an employee." (Complaint, Par. 8) in violation of §16(a)(1) of the Statute (Complaint, Par. 11) (The allegation of Paragraph 12 of the Complaint that the conduct alleged in Paragraph 8 of the Complaint also violated §16(a)(8) was not asserted as an issue by General Counsel in his Brief (General Counsel Brief, p. 1) and is not further considered).

Paragraph 9 of the Complaint asserts that Respondent failed and refused to authorize official time for Mr. Harrell as a designated representative of Local 106 for the purpose of negotiating a collective bargaining agreement; Paragraph 10 asserts that Respondent thereby failed to comply with the provisions of §31(a) of the Statute; and Paragraph 12 alleges that such conduct violated §§16(a)(1) and (8) of the Statute. I express no opinion as to whether an employee who is employed outside the bargaining unit is entitled to official time under §31(a) of the Statute,[5] inasmuch as the controlling reason for the denial of official time to Mr. Harrell was, for reasons more fully set forth hereinafter, because the parties agreed that the Union would have five (5) employees on official time for the purpose of negotiations (plus four (4) not on official time); Mr. Harrell was sixth on Local 106's list of negotiators; Respondent advised Mr. Harrell, and Local 106, that because Mr. Harrell was the sixth name listed he would not be allowed official time; Local 106 did not withdraw the name of any of its first five designated negotiators, although it did substitute Mr. Edward N. Brown for Mr. James E. Hennigan (G.C. Exh. 3), nor did Local 106 ever designate Mr. Harrell as a replacement for any of its first five designated negotiators; and Respondent, fully in accordance with its agreement, paid official time for Local 106's five designated negotiators. Not only did Respondent fully comply with the agreement[6] but there is no convincing

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[5] *Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, Case Nos. 5-CA-470, 5-CA-517, OALJ 81-110 (May 27, 1981), involved only travel and per diem expenses for employees in the bargaining unit; however, I am aware that other decisions of Administrative Law Judges have held that employees outside the bargaining unit are entitled to official time pursuant to §31(a). See, for example, *Veterans Administration, Cincinnati, Ohio*, Case No. 5-CA-795, OALJ 81-109 (Heifetz, J., May 20, 1981); *Internal Revenue Service, Southwest Region*, Case No. 6-CA-857, OALJ 81-136 (Mason, J., July 21, 1981); *Little Creek Amphibious Base and Navy Public Works Center*, Case Nos. 3-CA-882, 3-CA-883, OALJ 81-114 (Oliver, J. June 3, 1981).

[6] Respondent was free, of course, to so agree; but in point of fact, Respondent was under no obligation to bargain as to any minimum

(continued)

evidence that Respondent ever had more than five negotiators and §31(a) specifically provides that, "The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency ...."[7/] Therefore, for reasons more fully set forth hereinafter, I find no violation by Respondent in the denial of official time to Mr. Harrell, cf., Little Creek Amphibious Base and Navy Public Works Center, supra.

The Notice of Hearing of January 30, 1981, did not set a date, place or time of hearing and, on June 15, 1981, an Order Setting Time and Place of Hearing issued (G.C. Exh. 1(k)), and on June 25, 1981, an Order Changing Place of Hearing issued (G.C. Exh. 1(m)), pursuant to which a hearing was fuly held before the undersigned at Nassau Bay, Texas, on July 15, 1981. All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues involved, and were afforded opportunity to present oral argument. At the close of the hearing, August 17, 1981, was fixed as the date for mailing post-hearing

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(6/ continued)

number of representatives it would designate. National Federation of Federal Employees, Local 1451 and Naval Training Center, Orlando, Florida, 3 FLRA No. 14 (1980), aff'd, sub nom., National Federation of Federal Employees and Local 1451, National Federation of Federal Employees v. Federal Labor Relations Authority, 652 F. 2d 191, App. D.C. (D.C. Cir. 1981)

[7/] Although the record showed, at least on some occasions, that Respondent had fewer than five negotiators (see, Tr. 27) no opinion is expressed as to whether Respondent could properly, pursuant to §31(a), authorize official time for more Union negotiators than Respondent actually designated. Nevertheless, the United States Court of Appeals in its decision in National Federation of Federal Employees and Local 1451, National Federation of Federal Employees v. Federal Labor Relations Authority, supra, stated, in part:

> "... The legislative history of section 7131, however, makes it crystal clear that Congress wished to limit the number of union representatives who had to be paid for their representation time by pegging their number to the number of agency representatives, a number which the agency would designate ... To permit the union to bargain over the number of representatives management shall designate for collective bargaining would utterly confound the intention of the drafters of section 7131(a), and weaken the device they crafted to limit paid time for union negotiators." (625 F. 2d at 194)

briefs and each party, including the Charging Party, timely mailed a brief, received on or before August 21, 1981, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Case No. 6-CA-836

Findings

1. Mr. William Thomas Harrell has been a medical technologist for about two and one half years[8] and, because he is a professional employee, is not part of the bargaining unit (Tr. 20). Nevertheless, Mr. Harrell is a member of Federal Employees Local 106 of the National Alliance of Postal and Federal Employees (Tr. 21-22) (hereinafter, referred to as "Union").

2. In July, 1980, Mr. Shiloh, Union's Chief Steward, asked Mr. Harrell if he would like to participate as a member of the Union's negotiating team in the approaching contract negotations (Tr. 22-23) and Mr. Harrell responded that he would like to participate. Mr. Harrell stated that Mr. Shiloh said he would be granted official time during the negotiations which were scheduled to begin in November, 1980. Mr. Harrell testified that he informed Mr. Michael Gourrier, Chief Technologist, that he would need official time; however the date of his discussion with Mr. Gourrier was not shown.

3. Mr. Harrell testified that on October 1, 1980, Mr. Gourrier told him to come to a meeting in Dr. Tomas J. Molina's[9] office. Dr. Molina, a Pathologist, is the head of the Pathology Department of the United States Public Health Service Hospital at Nassau Bay, Texas, which includes the Hospital's laboratories (Tr. 98). Present at the meeting were Mr. Harrell, Mr. Gourrier and Dr. Molina. Mr. Harrell testified that Dr. Molina asked why he, Harrell, had independently transferred himself from the clinical chemistry department to the urinalysis department; that he, Harrell, asked for a union representative but Dr. Molina said, "... no, it wasn't necessary" (Tr. 52). Mr. Harrell stated that he told Dr. Molina that he had not independently transferred himself; that he had asked Mr. Gourrier to transfer him; and that Mr. Gourrier had transferred him to another section of the laboratory two

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[8] Previously, Mr. Harrell had been a medical technician for about three years. Medical technicians are not professional employees and are included in the bargining unit.

[9] Dr. Molina's legal name is Tomas Jaime Molina Escobar (Tr. 94); however, since becoming an American citizen, he has adopted the name of "Tomas J. Molina".

weeks earlier. Mr. Harrell further stated that Mr. Gourrier acknowledged that he had transferred Mr. Harrell (Tr. 52). Mr. Harrell then testified,

> "And so he continued to berat me as if Mr. Gourrier had not even acknowledged it and again I asked for a union representative and he told me that he did not like the union, that it came between him and his employees.
>
> "And we had become quite heated by that time. I told him that one other employee in this hospital, Mr. Sellers, had a grievance filed against him for making just that type of statement. And that was the end of the meeting." (Tr. 52)

On cross-examination, Mr. Harrell stated,

> "Q. I believe you also testified that the discussion became quite heated.
>
> "A. Not quite heated. We were somewhat unhappy with each other, I would say. (Tr. 53).

4. Dr. Molina testified, in part, as follows:

> "A. From what I remember, at that time Mr. Harrell was requesting a -- to represent the union, or he was trying to complain about not being authorized by administration to represent the union, okay, and apparently Mr. Gourrier had already received specific instructions about that since he was out of the bargaining unit he could not take administrative leave for that but that he could do it on an annual leave basis.
>
> "And Mr. Harrell, as usual, he was a little bit upset, but I tried to be as cautious and calm with him as possible with him because I have known to have had several problems before in the laboratory with other personnel, with the previous laboratory officer. So I don't remember to have said anything -- that is to the extent of my recollection, sir.
>
> . . .
>
> "Q. Would you rememver saying anything about the union at that meeting?

> "A. No, sir, and I don't believe I said anything against the union." (Tr. 95-96).

5. When asked specifically whether he said, "I do not like the union because it comes between me and my employees", Dr. Molina stated,

> "The Witness: No, sir, and I would like to mention that the wording of such a statement that is incriminated (sic) to me doesn't come in my own expression. It is something completely foreign. That particular expression wouldn't be expressed by me because it is not in my own language, the capability, that certain -- the phrase, the way it is put in, it is not in my expression, and I have not said anything like that." (Tr. 97).

6. Mr. Gourrier did not remember a meeting around October 1, 1980, nor any meeting with Mr. Harrell and Dr. Molina relating to Mr. Harrell's request for official time to participate in union negotiations (Tr. 99-100); however, when asked if he had ever heard Dr. Molina make a statement that was detimental to the union, Mr. Gourrier stated,

> "A. No, sir. I have never heard Dr. Molina make any inflammatory statements towards the union." (Tr. 100),

and when asked, specifically, if he had ever heard Dr. Molina say, "I do not like the union because it comes between me and my employees", stated,

> "A. No, sir. I have never heard Dr. Molina make that statement." (Tr. 100).

7. Mr. Harrell testified that after he told Mr. Gourrier, "that I would need official time" he was "later told that I would not get official time" (Tr. 23) and that he believed the Chief Technologist, Mr. Gourrier, told him initially (Tr. 23).

Conclusions

I do not find Mr. Harrell's testimony convincing. His statement on cross-examination that "we were somewhat unhappy with each other" is more consistent with Dr. Molina's testimony that Mr. Harrell "was trying to complain about not being authorized by administration to represent the union" and that Mr. Harrell "was a little bit upset" than with Mr. Harrell's assertion that Dr. Molina questioned him about his transfer which he condeded Mr. Gourrier made clear that he, Gourrier, had made. But more important, Dr. Molina quite credibly denied having made the statement attributed to him by Mr. Harrell and Mr. Gourrier, while he did not remember the meeting, fully confirmed Dr. Molina's denial by his testimony that he had "never heard Dr. Molina make that statement".

Indeed, Mr. Harrell's testimony that, when he asked for a Union representative, Dr. Molina had responded, "no, it wasn't necessary", is consistent with the charge that Respondent "refused to provide Mr. Harrell a Union Representative as requested ...."; but the charge alleged no anti-union statement. Accordingly, I conclude that the preponderance of the evidence fails to support the allegations of Paragraph 8 of the Complaint that Dr. Molina made any anti-union statement. To the contrary, I conclude that Dr. Molina did not make the statement attributed to him, namely, that "he did not like the union, that it came between him and his employees", and, therefore, express no opinion as to whether such statement, had it been made, would, or would not, have constituted a violation of §16(a)(1) of the Statute.

Case No. 6-CA-903

Findings

1. As set forth above in relation to Case No. 6-CA-836, Mr. Harrell informed Mr. Gourrier of his need for official time for negotiations and Mr. Gourrier later told Mr. Harrell that he "would not get official time". Indeed, from Dr. Molina's testimony, it appears that at the meeting on October 1, 1980, Mr. Harrell was told that "... since he was out of the bargaining unit he could not take administrative leave for that but that he could do it on an annual leave basis."

2. Nevertheless, after Mr. Gourrier told Mr. Harrell that he would not get official time, Mr. Harrell stated that he talked to Chief Steward Shiloh about it and thereafter the Union submitted a list of its negotiators for the November 3, 1980, negotiations on which Mr. Harrell's name was the sixth name listed. Mr. Harrell testified that on October 30, 1980, Mr. Thomas C. Long, Respondent's Regional Labor Relations Officer, called him and told him he,

> "... was being deleted from the negotiating team, and I asked him why and he said I was the last on the list and they were going to -- only going to allow labor five negotiators and there were -- they submitted a list of six." (Tr. 24).

3. On November 3, 1980, Mr. Harrell requested, and was granted, annual leave to attend the negotiations. Present for Respondent were: Mr. Long, Chief Negotiator and Mr. Buckley. Present for the Union were: Mr. Erie R. Doyle, Chief Negotiator, and Messrs. Long, Fisher, Rabb, Shiloh, Brown, Black, Maddox, Harris and Harrell (Tr. 26, 44). Mr. Long and Mr. Doyle went to a separate conference room but, Mr. Harrell stated, that Messrs. Shiloh, Williams and Maddox, at times, had gone to the other conference rooms, while the rest of them waited in the conference room to which they had been escorted. At about 10:00 or 10:30 a.m., Mr. Doyle returned and said "they had called an impasee ...and that ... negotiations had been cancelled to a later date." (Tr. 44).

4. By letter dated December 19, 1980 (G.C. Exh. 2), the Union transmitted a list of employees designated as members of the Union negotiating team. Six names were listed and, again, Mr. Harrell was number six. By letter dated December 30, 1980 (G.C. Exh. 3), the Union deleted the name of Mr. James E. Hennigan (number five on its list of December 19, 1980) and substituted the name of Edward N. Brown, i.e., Mr. Brown was, specifically, designated number 5; Mr. Harrell remained, specifically, designated number 6; and Mr. Hennigan was designated number 7 - "Delete" (G.C. Exh. 3).

5. Respondent had signed and submitted a document entitled "Memorandum of Understanding Rules and Procedures for Negotiating Sessions" on December 3, 1980 (G.C. Exh. 4, Res. Exh. 1). The Union, as stated in its letter of December 19, 1980, did not agree with Respondent's "Memorandum of Understanding", and in particular as to the size of the negotiating teams, and, accordingly, the parties met with a mediator on Janaury 12, 1981, at which time the following amendment to Paragraph 2 was agreed to:

> "Negotiators for each party will consist of a chief negotiator, 5 negotiators on the clock, 4 off clock non-bargaining unit employees, for a total number of 9" (G.C. Exh. 4; Tr. 67).10/

In addition, the last sentence of Paragraph 2 was deleted and, as amended, the "Memorandum of Understanding" was signed by the Union on January 12, 1981 (G.C. Exh. 4; Res. Exh. 1).

6. The "Memorandum of Understanding", as signed on January 12, 1981, provided, in part, as follows:

> "2. Negotiators and Alternates
>
> . . .
>
> b. ... Alternates who replace negotiators will

10/ The handwritten insert on G.C. Exh. 4, by Mr. Doyle, was, and is, difficult to decipher and the language quoted is based on Mr. Doyle's testimony, summarized, and affirmed by Mr. Doyle, at page 67 of the transcript. Respondent's Exhibit 1, shows the agreed amendment as follows:

> "5 bargaining unit employees on clock, 4 non-bargaining unit off clock, 9 total" (R. Exh. 1).

Mr. Doyle also acknowledged his signature on Respondent Exhibit 1 and affirmed that was what was agreed to in the meeting of January 12, 1981 (Tr. 102).

> be announced at the beginning of each session in which they serve as negotiator.
>
> "3. Change of Negotiators
>
> In the event either party finds it necessary to change negotiators during any part of the negotiations the chief negotiator shall notify the other party twenty-four (24) hours in advance as to the name of the replacement." (G.C. Exh. 4; Res. Exh. 1).

7. The next negotiating session was held on January 13, 1981, and in attendance for the Union were, inter alia, Messrs. Shiloh, Black, Rabb, Fisher, and Brown (Tr, 45), the Union's first five designated negotiators, each of whom was in the bargaining unit. Mr. Harrell was also present as were other non-bargaining unit negotiators, including Messrs. Maddox, Harris, Doyle and Lacy. Mr. Harrell attended, and participated in, negotiations in January and February, 1981,11/ on annnual leave but did not attend in March, 1981, because he "was running low on annual leave". (Tr. 48), Messrs. Shiloh, Black, Rabb, Fisher and Brown were paid official time (Tr. 71).

8. Of the designated bargaining unit negotiators, only Mr. Rabb did not attend each negotiating session; but it was not shown when Mr. Rabb was absent. The record is clear that, in any event, the Union never gave notice that Mr. Harrell was substituting for Mr. Rabb (Tr. 78); nor did the Union ever seek to replace Mr. Rabb as negotiator (Tr. 90).

Conclusions

Mr. Harrell may well have been told in October, 1980, by Dr. Molina, that he could not take administrative leave for negotiations because he was not in the bargaining unit; but the record is clear that on October 30, 1980, Mr. Long, Respondent's Labor Relations Officer, told Mr. Harrell his name was being deleted for the reason that he "was the last on the list and they were ... only going to allow labor five negotiators and ... they submitted a list of six." Indeed, as Respondent had only two negotiators at the meeting of November 3, 1980, and as §31(a) of the Statute provides that the number of employees for which official time is authorized, "... shall not exceed the number of individuals designated

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11/ Mr. Doyle testified that negotiations were held on: January 13, 14, 15, 16; February 9, 10, 11, 12; March 2, 3, 4, and 5 (Tr. 74). Mr. Doyle testified that Mr. Harrell atended the four January sessions; but was not present " all of February" and was not present at all in March. (Tr. 74). Mr. Rabb was not present at every session (Tr. 73) but the record does not show when he was absent. (Tr. 73).

as representing the agency for such purposes", insofar as the Stature is concerned only two employees were entitled to official time. As noted above, Respondent was under no duty to bargain as to any minimum number of representatives it would designate, National Federation of Federal Employees, Local 1451 and Naval Training Center, Orlando, Florida, supra, and, accordingly, Respondent's refusal to grant official time to Mr. Harrell on November 3, 1980, did not violate §31(a), nor, in turn, §§16(a)(1) or (8) of the Statute. Nor, of course, is there any doubt that, nothwithstanding Mr. Long's use of the word "delete", all parties fully understood that Mr. Harrell's name was removed as a negotiator only in the sense that he would not be granted official time. Thus, Mr. Harrell requested, and was granted, annual leave to attend the November 3 negotiations.

Thereafter, the Union again submitted its list of negotiators, on December 19, 1980, and Mr. Harrell was, again number 6. On December 30, 1980, the Union substituted Mr. Brown for Mr. Hennigan but Mr. Harrell was designated number 6. Then, on January 12, 1981, the parties agreed that,

> "Negotiators ... will consist of a chief negotiator, 5 negotiators on the clock, 4 off clock non-bargaining unit employees, for a total number of 9".

The Union had 5 negotiators on the clock, not including Mr. Harrell, at the next bargaining session on January 13 and at every subsequent bargaining session except that Mr. Rabb wes absent at some unspecified session or sessions. However, the Union never sought to change negotiators, as Paragraph 3 of the "Memorandum of Understanding" permitted, to name Mr. Harrell in lieu of Mr. Rabb; nor did the Union ever seek to replace Mr. Rabb with Mr. Harrell, as Paragraph 2 of the "Memorandum of Understanding" also provided if Mr. Harrell were deemed an "alternate" negotiator. Nor, of course, did the Union ever take any action to designate Mr. Harrell as one of its first five designated negotiators either before or after its January 12 agreement which provided that there would be "5 negotiators on the clock, 4 off clock non-bargaining unit employees ...." Consequently, Respondent fully complied with the "Memorandum of Understanding" and General Counsel has shown no basis whatever for a violation of §31(a) or of §§16(a)(1) or (8) of the Statute. The Union may have wanted to raise as an issue the entitlement of a non-bargaining unit employee to official time; but if this were its desire, it failed to do so. By its agreement that there would be a chief negotiator, Mr. Doyle, and "5 negotiators on the clock" and its designation of five negotiators who would be "on the clock", which did not include Mr. Harrell, and by its failure to take any action, as the "Memorandum of Understanding" permitted, to replace or change Mr. Rabb as one of its designated "on the clock" negotiators with Mr. Harrell, the Union has precluded any decision on such issue and I expressely decline to express any opinion whatever on an issue that is not properly before me.

Accordingly, as the preponderance of the evidence fails to show any violation of §§16(a)(1) or (8) of the Statute as alleged in the Complaint it is recommended that the Authority issue the following:

ORDER

The Complaint in Case Nos. 6-CA-836 and 6-CA-903 be, and the same is hereby, dismissed.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: January 12, 1982
Washington, D.C.

93/#11

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 11

June 5, 1982

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

UNFAIR LABOR PRACTICE CASES

Case No. 2-CA-793 (June 4, 1982)

Veterans Administration Medical Center, Northport, N.Y. and National Federation of Federal Employees Local 387, Independent

Case No. 8-CA-753 (June 4, 1982)

Department of the Navy, Pearl Harbor Naval Shipyard, Pearl Harbor, Hawaii and Hawaii Federal Employees Metal Trades Council, AFL-CIO

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* THIS REPORT SERIES INCLUDES DECISIONS AND ORDERS OF FLRA ADMINSITRATIVE LAW JUDGES TO WHICH NO EXCEPTIONS WERE FILED WITH THE AUTHORITY WITHIN THE PRESCRIBED TIME LIMIT. IN ACCORDANCE WITH SECTION 2423.29(a) OF THE AUTHORITY'S RULES AND REGULATIONS, AS AMENDED (46 FED. REG. 40674 (1981)), THE FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS IN SUCH ALJ DECISIONS CONSTITUTE, WITHOUT PRECEDENTIAL SIGNIFICANCE, FINDINGS, CONCLUSIONS, DECISIONS AND ORDERS OF THE AUTHORITY.

Y3. F31/21-3:

[2-CA-793]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION MEDICAL
CENTER, NORTHPORT, N.Y.

(Respondent)

and

Case No. 2-CA-793

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES LOCAL 387, INDEPENDENT

(Charging Party)

ORDER

The Administrative Law Judge issued a Decision and Order in the above-entitled case concluding, in part, that the Respondent had engaged in certain unfair labor practices alleged in the complaint and recommending that the Authority order the Respondent to cease and desist therefrom and also to take certain affirmative action.

No exception to the Administrative Law Judge's Decision and Order was filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's rules and regulations, as amended (5 CFR § 2423.29(a)(1982)), the findings, conclusions, and recommendations of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations found by the Administrative Law Judge and take the affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., June 4, 1982

for Harold D. Kessler
James J. Shepard, Executive Director

[2-CA-793]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

VETERANS ADMINISTRATION MEDICAL CENTER, NORTHPORT, N.Y.

Respondent

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES LOCAL 387, INDEPENDENT

Charging Party

Case No.: 2-CA-793

George S. Ahrens, Esq.
For the Respondent

Robert J. Warner, Esq.
For the General Counsel

Edward A. Gray, Esq.
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

This proceeding arises under the Federal Service Labor-Management Relations Statute (herein called the Act). It is based upon a charge filed on February 18, 1981 by National Federation of Federal Employees, Local 387, Independent (herein called the Union) against Veterans Administration Medical Center, Northport, N.Y. (herein called the Respondent).

Pursuant to said charge a Complaint and Notice of Hearing was issued on April 30, 1981 by the Regional Director for the Federal Labor Relations Authority, New York Region. The said complaint alleged that: (a) since

January 29, 1981 Respondent refused to negotiate concerning the substance, impact and implementation of its decision to eliminate parking by unit employees in Parking Lot D at the Medical Center; (b) on or about March 2, 1981 Respondent unilaterally changed its policy concerning employee parking by eliminating all employee parking in Lot D at the Medical Center - all in violation of Section 7116 (a)(1) and (5) of the Act.

Respondent filed an answer to the complaint, dated June 9, 1981, in which it denied the aforesaid allegations and the commission of any unfair labor practices.

A hearing was held before the undersigned on July 27, 1981 at New York, N.Y. All parties were represented thereat, and each was afforded full opportunity to be heard, adduce evidence, and examine as well as cross-examine witnesses. Thereafter briefs were filed with the undersigned which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein the Union has been, and still is, the exclusive bargaining representative of all non-supervisory registered nurses employed by Respondent's Nursery Service at Northport, N.Y., including nurse Technicians and Instructors.

2. Both the Union and Respondent are parties to a written agreement executed on February 8, 1974, which recognizes the Union as the bargaining representative of the employees in the appropriate unit described above.1/

3. About 400 physicians utilize the facilities of the hospital to perform services thereat. The regular staff consists of 127 physicians, of which 77 are part-time; there are 200 consultants and attending physicians; and the house staff includes 84 professionals who are interns, residents and those in training. Further, approximately 250 registered nurses comprise the appropriate unit represented by the Union herein.

4. The regular tours of duty for the nurses are three in number: 7:30 a.m. - 4:00 p.m.; 3:30 p.m. - 12 midnight; 12 midnight - 7:45 a.m. In addition several off-tours of duty for the nurses exist at the hospital: a few such tours run from 8:30 a.m. - 5:00 p.m.; two start at 9:00 a.m.; and one begins at 4:00 p.m. for about 20 registered nurses.

1/ The said agreement and its terms continue in effect.

5. There are about 16 parking lots distributed throughout the Medical Center's grounds, all of which provide some 1684 parking spaces for vehicles which are parked by physicians, nurses, staff personnel, employees and visitors to the hospital. The Union has its offices situated in Building 12 which is located directly opposite parking Lot D. There are 104 spaces for vehicles in this particular lot.

6. Prior to 1978, and pursuant to a memorandum issued by management in 1975, the spaces in parking Lot D were set aside for part-time physicians, consultant and attending physicians, patients, and visitors. No provision was made for employees to use this parking lot, although the rule limiting the availability thereof was not enforced. Thus, other employees, including the nurses, also utilized the parking spaces in Lot D.

7. In 1978 Francis E. Conrad, Chief of Staff, recommended a change in the policy regarding parking spaces. This was due to numerous complaints received from doctors who, in attending to duties at the hospital, were unable to locate parking spaces for their cars. As a result of his recommendation to the director, management memorandum 138-20, which was dated April 24, 1978, designated consultant/part-time physicians as eligible to use 22 spaces in Lot D. These spaces were set aside and reserved for this professional group during the hours 7:00 a.m. - 5:00 p.m. daily, except weekends and holidays. A controlled access gate, card-operated, was established for that purpose.

8. By letter dated April 10, 1979 Evelyn Smallwood, Chief, Personnel Service of Respondent, wrote Edward Gray, President of the Union herein, confirming an agreement between the parties concerning: (a) The implementation of designating Parking Lot D for consultants and part-time physicians; (b) The gate would be raised at 3:00 p.m. allowing access to the area in order to minimize the impact to members of the bargaining unit.

9. Management then reserved 34 more parking spaces in Lot D for consultants and part-time physicians. By 1980 there were 56 spaces set aside in this lot for the aforesaid professionals.2/ In January, 1980, the State University of New York at Stony Brook, with which the Respondent Medical Center is affiliated, opened its hospital. This event accounted for physicians spending time at each facility, and added to the problem of insufficient parking spaces for consultants and other physicians.

10. Smallwood wrote Gray a letter, dated December 10, 1980, in which she referred to the fact that the physicians' parking area in Lot D was filled to capacity and oftentimes overflowing. The management official

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2/ Nurses still continued to park in available spaces in Lot D.

stated the barrier separating the physicians' lot from the adjacent spaces in the west end of Lot D would be removed to allow for expansion; that 20 additional spaces for physicians would result and thus accommodate the needs of the Center for parking spaces. In concluding the letter, Smallwood asked Gray to furnish comments by December 18, 1980.

11. Gray replied thereto in a letter dated December 16, 1980 and stated that the Union desired "to meet with management to negotiate the impact the expansion of parking space for part-time physicians will have on our members."

12. A meeting between the parties was held on December 30, 1980. Management proposed taking the remaining 48 spaces in Lot D, and Gray questioned the need for such action since reserved spaces were only for part-time physicians and consultants. The union official asked management representative Parker for a list of the physicians in those categories who used Lot D. Discussion also took place regarding security since some nurses discovered patients sitting in cars belonging to the staff. Gray mentioned that the union had further need for spaces to be allotted to nurses who worked odd tours, as 9 to 5. Parker agreed to obtain the data requested by Gray and meet again.

13. Smallwood sent a letter dated January 29, 1981 to Gray regarding the meeting held on December 30, 1980 as to the extension of restricted parking for physicians to the west end of Parking Lot D. In respect to the question raised at the meeting as to whether only part-time physicians and consultants used the lot, Smallwood stated that the Center decided that Lot D should be available to all physicians (full or part-time) in order to provide quality care to veterans. Further, she commented that the Medical Center considered the impact on working conditions and "finds that adequate parting spaces will continue to be available to accommodate all employees". Smallwood advised Gray that effective March 2, 1981 the barrier separating restricted parking from open parking in Parking Lot D will be removed, and the entrance to the present open portion would be closed. Accordingly, as stated, parking in Lot D in its entirety would be restricted to physicians parking between 7:00 a.m. - 3:00 p.m., Monday through Friday.

14. By letter dated February 25, 1981 Gray requested management to reconsider the position regarding the parking lot expansion, and he stated that the Union is ready to meet and discuss the problem.

15. In a reply letter dated February 27, 1981 Smallwood repeated the conclusion which management reached concerning the need to extend the physicians parking area; that the restricted portion of Lot D would not accommodate the need to provide spaces for physicians; but adequate spaces are still available for all employees; and that the actions, as indicated in her letter of January 29, would take effect on March 2.

16. On March 2, 1981 Respondent assigned the remaining 48 parking spaced in Lot D for exclusive use by the physicians. The entire parting area (104 spaces) in said lot was reserved for the physicians. The nurses were no longer permitted thereafter to park their vehicles in Lot D, and they have not done so since the aforesaid date.

17. Two additional letters were sent by the Union to management. A letter dated March 6, 1981 reminded Smallwood that Respondent had never submitted the list of physicians who were entitled to use Lot D. Gray also stated that it was presumptuous for management to unilaterally evaluate the impact upon unit members, and he requested Respondent to meet and negotiate the matter. The Union's final letter of May 17, 1981[3] requested management to make other proposals regarding Parking Lot D, and Gray suggested specific dates for a meeting between the parties.

18. Record facts show that the consultants and part-time physicians generally report to the Center after the start of the official duty tours; that, as a rule, the spaces in Lot D would be filled and not available for the physicians. While no exact figure is available, the record reflects that a minimum of 20 nurses used Lot D on a daily basis.

19. The nurses work in various buildings which are part of the Medical Center. Daytime nurses (7:30 a.m. - 4:00 p.m.) would not usually be confronted with a parking problem since there are other parking lots adjacent or near their work stations. The record reflects that nurses have not failed to find a place to park their cars in view of the numerous spaces in all lots, but they may not be able to park nearby or close to their work sites. No spaces would be available in Lot D for nurses who report at 3:30 since the majority of the employees, who are on the day shift, do not finish work until 4:00 p.m.[4]

20. Chief Steward Marie Smith testified that the loss of parking spaces for the nurses in Lot D resulted in the following:

(a) A loss in prestige since Respondent's action demonstrated a marked and unwarranted distinction between physicians and nurses.

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[3] The letter postdated issuance of the complaint herein.

[4] Respondent's Chief of Police, James W. Rockfeller, Jr., testified that, prior to the full reservation of Lot D for physicians, parking was not available for others until after 4:00 p.m. However, after March 2 there were spaces for parking thereat by about 2:30 p.m. - 3:00 p.m. because of transient parking of physician coming and going between those hours.

(b) Increased distances that nurses and others are required to walk when going to work stations after parking elsewhere than in Lot D.[5]

(c) The Union office is not as accesible to union members or others visiting the Union.

(d) Nurses who work off-hours of duty and come in at unusual hours have a different time finding parking spaces. They relied on Lot D as their primary parking area, since the other nearby lots, as the one near Building 200, fill up beforehand.

Conclusions

The central issue is whether the Respondent, by eliminating parking spaces[6] for unit employees on March 2, 1981 in Parking Lot D without negotiating with the Union in respect thereto, violated Sections 7116(a)(1) and (5) of the Act.

Respondent takes the position that it has no obligation to bargain regarding this matter. It asserts that a "compelling need" existed for the decision to reserve the additional 48 spaces for its physicians, and thus under Section 7117 of the Act no duty devolves upon it to negotiate as to its rule in this regard. Further, the employer argues that the rule does not affect working conditions of bargaining unit employees; that no rule granted exclusive use of the unreserves portion of Lot D to the nurses, and thus their rights were not infringed upon by management's action on March 2, 1981.

Several cases have arisen in the public sector dealing with regulations issued by management concerning parking areas and the duty to bargain in regard thereto. In General Services Administration, Region 3, Public Buildings service, General Support Field Office, A/SLMR No. 583, which arose under Executive Order 11491, as amended, the Assistant Secretary concluded that parking privileges are clearly working conditions; that management had an obligation to meet and confer with respect thereto under Section 11(a) of the Order. When the employer, in the cited case, unilaterally altered its past practice of permitting unrestricted parking of vehicles, it violated its obligation to negotiate such change with the bargaining representative. To the same effect, the Assistant Secretary later held that an activity's order changing parking policies, without prior notice to the union, was a refusal to consult and negotiate in violation of the Order. He affirmed the former conclusion that the parking policy was a "matter affecting working conditions". See Federal Aviation Administration, FAA Aeronautical Center, Oklahoma City, Oklahoma, A/SLMR No. 1047.[7]

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[5] Testimony adduced from Smith reflects the people had to walk several hundres spaces farther to work after the 48 spaces in Lot D were taken for the physicians. The Parking Facilities Map (Respondnent's Exhibit 1) does show that Lot D is several hundred feet closer to certain buildings (2, 11, and 12) that the lot in front of Building 200 - a main work station for many nurses.

[6] The Union does not challenge the past actions by Respondent in eliminating 56 parking spaces in Lot D for use by nurses, which was effected by agreement or negotiation. It objects to the transfer of the remaining 48 spaces in Lot D to the physicians on March 2, 1981 as a unilateral act in violation of the Statute.

The Authority has put its imprimatur on the conclusion reached in the cited cases regarding the negotiability of policies dealing with parking by employees. Thus, in National Treasury Employees Union, Chapter 6 and Internal Revenue Service, New Orleans District, 3 FLRA No. 118, the employer notified the union of its intention to release (to GSA) most of the pre-paid parking spaces. The bargaining representative proposed that such spaces for unit employees not be so released. It was held that the proposal, insofar as it would require the agency to retain the disputed parking spaces for employee parking, is within the agency's duty to bargain under the Statute. In the cited case the Authority, recognizing that under 7106(b)(1) of the Act an agency may elect whether it will negotiate regarding "methods" and "means" of performing work, determined that the union proposal did not concern the performance of the agency's work. The union was proposing that spaces be retained so the employees would have a place to park cars used in commuting to work. It did not propose retention so employees could have cars available for use in performing official duties. As such, the proposal was not one concerning which the agency may elect to negotiate under 7106(b)(1), but is within its duty to bargain.

In respect to the defenses raised by Respondent herein, I conclude they lack merit. Particular stress is laid upon the fact that a "compelling need" exists for the 48 spaces in Lot D for physicians only. It is argued that its rule designating the spaces for such case meets the criteria established for a compelling need under 5 C.F.R. 2424.11; that, therefore, under Section 7117 of the Act no duty exists to bargain with the Union in regarding the 48 spaces taken on July 2, 1980. The difficulty with this contention lies in the fact that Section 7117(a)(2) bespeaks of agency rule or regulation in imposing an obligation to bargain when no compelling need exists for such rule or regulation. No evidence appears in the instant case that the rule removing the 48 spaces in Parking Lot D was an agency one. Contrariwise, the rule or regulation emanates from the activity in Northport, N.Y., and it has not been shown that the Veterans Administration imposed the directive.[8] I am constrained to conclude that Respondent may not validly raise the issue of "compelling need" in this unfair labor practice proceeding, and that such contentions will not support its refusal to bargain regarding alleged changes in its parking rules.

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[7] Likewise, in Social Security Administration, Bureau of Hearings and Appeals, A/SLMR No. 828 unilateral changes by management in the use of visitor passes by employees was deemed to be in derogation of the obligation to negotiate thereon.

Respondent agrues that it has no obligation to negotiate the removal of the 48 spaces from parking for nurses and visitors. It contends that the rule promulgated in regard thereto did not affect the working conditions of the nurses. This contention is bottomed upon the premise that Lot D was not reserved for them but was open to all employees. Thus, Respondent asserts, there would be no change regarding their rights. In making this argument Respondent cites National Council of Field Labor Local, AFGE, AFL-CIO and U.S. Department of Labor, 3 FLRA No. 44. Where the Authortiy stated that a bargaining agent's obligations and rights extend only to unit employees. Since the union's proposal related to the method that management would use in filling supervisory and management positions (non-bargaining), the proposal was deemed outside the duty to bargain.

The negotiability decision relied open by Respondent's is inapposite herein. There is no attempt by the Union in the case at bar to bargain regarding non-unit employees' rights, or to interfere in management's decision regarding supervisory or management employees. The bargaining representative herein was concerned with the effect upon the nurses, whom it represented in an appropriate unit, of the removal of the 48 parking spaces in Lot D. While those spaces may have been utilized by others as well. the fact remains that the nurses were permitted to park thereat and they relied upon that privilege in commuting to and from work. As such, the utilization by the nurses of these parking spaces in Lot D was part of their working conditions. See Social Security Administration, Bureau of Hearings and Appeals, supra.

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[8] Apart from the fact that it is not manifestly evident that the rule in essential to the accomplishment of Respondent's mission, the procedure for determining "compelling need" is set forth under Section 7117(b) of the Act. The latter provides for a separate hearing preliminarily to a determination. No such procedure was involved herein.

In sum, I reject the contention that the removal of the 48 parking spaces by Respondent in Parking Lot D was outside the scope of the employer's obligation to bargain. It was, in my opinion, clearly a matter affecting the working conditions of the nurses who were unit employees represented by the Union. It was also a departure from the past practice of allowing the nurses to park their cars in the 48 spaces allotted therefor in Parking Lot D. Although such spaces were not reserved for them, Respondent adhered to the policy of permitting the unit nurses to utilize them when commuting to and from work stations. Thus, the action taken by Respondent in regard to the 48 spaces was a change in the conditions of employment of these employees. Further, since it was effected unilaterally the Respondent abridged its duty to bargain under the Statute and violated Sections 7116(a)(1) and (5) thereof.

Having found that Respondent violated the Federal Labor Relations Act as aforesaid, I recommend the Authority adopt the following Order:

ORDER

Pursuant to Section 7118(a)(7) of the Federal Service Labor-Management Relations Statute and Section 2423.29 of the Rules and Regulations, it is hereby ordered that the Veteran's Administration Medical Center, Northport, New York, shall:

1. Cease and desist from:

(a) Instituting changes in its policy of permitting unrestricted parking of its nurses' private vehicles in the 48 parking spaces in Parking Lot D, which have been available for that purpose, without first notifying National Federation of Federal Employees, Local 387, Independent and affording it the opportunity to bargain concerning a proposed change in such policy.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statue.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Federal Servcie Labor-Managment Relations Statute:

(a) Rescind in writing its directive that effective March 2, 1981 parking spaces for vehicles in Parking Lot D would be restricted entirely to physicians between 7:00 a.m. and 3:00 p.m., Monday through Friday of each week.

(b) Restore 48 parking spaces in Parking Lot D for the use of all nurses in the unit represented by National Federation of Federal Employees, Local 387, Independent during the hours between 7:00 a.m. and 3:00 p.m., Monday through Friday of each week.

(c) Upon request, bargain in good faith with the National Federation of Federal Employees, Local 387, Independent, with respect to any changes in its policy of permitting unrestricted parking of the unit nurses' private vehicles in 48 spaces in Parking Lot D between 7:00 a.m. and 3:00 p.m., Monday through Friday of each week.

(d) Post at its facility in Northport, New York, copies of the attached notice marked "APPENDIX" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the facility's Director, and they shall be posted for 60 consecutive days thereafter in conspicuous places where notices to employees are customarily posted. The Director shall take reasonable steps to ensure that such notices are not altered, defaced, or covered by any other material.

(e) Notify the Federal Labor Relations Authority in writing, within 30 days from the date of this Order, as to what steps have been taken to comply therewith.

William Naimark

WILLIAM NAIMARK
Administrative Law Judge

Dated: March 12, 1982
Washington, D.C.

[2-CA-793]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute changes in our policy of permitting unrestricted parking of nurses' private vehicles in 48 parking spaces in Parking Lot D, which have been available for that purpose, without first notifying National Federation of Federal Employees, Local 387, Independent, and affording it the opportunity to bargain concerning a proposed change in such policy.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statue.

WE WILL rescind in writing our directive that effective March 2, 1981 parking spaces for vehicles in Parking Lot D would be restricted entirely to physicians between 7:00 a.m. and 3:00 p.m., Monday through Friday of each week.

WE WILL restore 48 parking spaces in Parking Lot D for the use of all nurses in the unit represented by National Federation of Federal Employees, Local 387, Independent, during the hours between 7:00 a.m. and 3:00 p.m., Monday through Friday of each week.

WE WILL bargain in good faith, upon request, with the National Federation of Federal Employees, Local 387, Independent, with respect to any changes in our policy of permitting unrestricted parking of the nurses' private vehicles in 48 spaces in Parking Lot D between 7:00 a.m. and 3:00 p.m., Monday through Friday of each week.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 2, whose address is: 26 Federal Plaza, Room 241, New York, NY 10278, and whose telephone number is: (212) 264-4934.

[8-CA-753]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE NAVY
PEARL HARBOR NAVAL SHIPYARD
PEARL HARBOR, HAWAII

(Respondent)

and

Case No. 8-CA-753

HAWAII FEDERAL EMPLOYEES METAL
TRADES COUNCIL, AFL-CIO

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative actions.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (5 CFR 2423.29 (1982)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., June 4, 1982

for James J. Shepard, Executive Director

[8-CA-753]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF THE NAVY
PEARL HARBOR NAVAL SHIPYARD
PEARL HARBOR, HAWAII

Respondent

and

HAWAII FEDERAL EMPLOYEES METAL
TRADES COUNCIL, AFL-CIO

Charging Party

Case No. 8-CA-753

Patricia F. Mayer, Esq.
For the General Counsel

Mr. Robert F. Griem
Mr. Bert Lederer
For the Respondent

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This case arose pursuant to the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. § 7101 *et seq*. (hereinafter called the Statute), as a result of an unfair labor practice Complaint and Notice of Hearing issued December 30, 1980 by the acting Regional

Director, Region 8, Federal Labor Relations Authority, Los Angeles, California.[1]

The instant complaint alleges that Department of the Navy, Pearl Harbor Naval Shipyard, Pearl Harbor, Hawaii (hereinafter called Respondent), unilaterally terminated environmental differential pay for employees engaged in metal brushplate work without affording the Hawaii Federal Employees Metal Trades Council, AFL-CIO (hereinafter called the Union) an opportunity to bargain over such change. Respondent's answer denied the commission of the unfair labor practice alleged herein.

A hearing in this matter was conducted before the undersigned in Honolulu, Hawaii. All parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and argue orally. Briefs were timely filed and have been duly considered.

Upon the entire record in this matter, including my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following findings of fact, conclusions and recommendation.[2]

Findings of Fact

1. Respondent and the Union are parties to a collective bargaining agreement. Article XXIII, Section 4, of the agreement states:

> Any changes to the Shipyard's environmental pay Instructions within the discretion of the Employer shall be made in accordance with Article II, Administration of Agreement. The parties will meet and confer in connection with this Section normally at least ten (10) working days in advance of the effectuate date of the change.

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[1] This matter was orginially issued as part of a Consolidated Complaint and Notice of Hearing. On February 24, 1981, the Regional Director issued an order severing cases, withdrawing order consolidating cases, and withdrawing the consolidated complaint in the severed cases leaving only the instant matter remaining.

[2] The General Counsel unopposed Motion to Correct Transcript is granted.

Article II, Section 3 a through f of the agreement recites and states, in pertinent part:

> . . . the Employer will consult with the [Union] as provided in Section 4 below, and shall give due regard to its views on the matter under consultation and to established practices within Unit One. The above requirement shall not prevent the Employer from establishing a new or changing an existing rules or regulation to meet the Employer's needs, or the requirements of law, regulations of higher authority.

2. For around six years, machinists assigned to Shops 31 and 38 at Respondent's facility have engaged in a electrochemical process used to build up metal known as brushplating. These machinists have received a (4) four precent pay differential of their hourly wage since the inception of this process at the facility. The four percent differenital was compensation for work which was termed "dirty pay" amounted to $50.00 to $60.00 per month differential pay for these machinists. This differential was last paid on September 12, 1980.

3. Sometime in early August 1980, during an informal conversation in a hallway at the facility, Benjamin Toyama, the Union's president was informed by Wayne Uesugi, a labor relations specialist at the facility that Respondent was considering cutting dirty pay for brushplating. Toyama replied that he "didn't think cutting the pay was right" that he did not agree, and that he thought the issue was negotiable. These two set up a meeting which was subsequently held on August 13, 1980.

4. Approximately six-months before this encounter between Toyama and Uesugi, in Feburary 1980, Paul Hashimoto, a Position Classification Specialist submitted an audit report concerning the brushplating work in Shop 31.

5. On February 26, 1980, the Naval Audit Office Honolulu sent a memorandum to the Director, Management Engineering and Information recommending that the facility "discontinue paying employees in the brushplating work center environmental pay differential for dirty work." Neither this audit nor its findings which triggered Respondent's action to terminate the pay was revealed to the Union.

6. According to Wayne Uesugi, he first received knowledge of the audit around April 8, 1980. Uesugi testified that he had received a packet of information, and the Hashimoto audit report concerning the termination of dirty pay in April 1980. Uesugi also discussed the packet and report with other Shipyard officials and both Uesugi and Herbert

Colwes, a supervisory labor relations specialist admit that a "tentative" decision was made that payment of environmental differential was improper and should be eliminated sometime during the spring of 1980.

7. Respondent and the Union met on August 13, 1980 with the Respondent represented by Superintendents Lee, Karasaki and Blaney, classification specialist Hashimoto, and labor relations specialist Uesugi. The Union was represented by Toyama and two stewards, Ackley and Casem. Although the termination of dirty pay was discussed, there is little agreement over what was said.

8. Uesugi apparently opened the meeting by stating that Respondent had decided to terminate dirty pay for brushplating work and that the decision would take effect as of September 15, 1980. Uesugi maintains that the purpose of the meeting was to consult concerning the termination of dirty pay. Toyama then protested the holding of the meeting in light of the fact that a decision had already been made. Uesugi explained to Toyama that payment of the differential was illegal. When questioned Uesugi replied that the illegality of such payments meant that they should not be paid. Hashimoto then discussed his audit and findings. At which point, Toyama asserted that the issue of termination of the dirty pay was negotiable.

9. Karasaki volunteered that because brushplating was now a "normal part of the job" the payments were illegal. Toyama asserted once again that the subject was negotiable, directing attention to the current negotiated agreement, Article XXIII, Section 4. Uesugi referred to a memorandum from Vallejo, California, and told Toyama that on the basis of that letter the brushplating process was not soil or filth, therefore payment of dirty pay was illegal and could not be negotiated. The discussion turned to examples of soil or dirt, after which Toyama reasserted the Union's right to negotiate, in particular, pursuant to the Federal Personnal Manual (FPM).[3]

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[3] FPM 532-1, subchapter S8-7, which instructs on the procedures to be followed in the payment of enviroment differentials provides, in pertinent part:

> b. Basis for enviromental differential. These instructions provide the basis for (1) approving and paying enviromental differentials to wage employees (full-time,

(Continued)

3/ (Continued)

> part-time, or intermittent); listing categories of situations in appendix J of this subchapter and specifying the differentials payable for each category to identify the various degrees of hazard, physical hardships, and working conditions of an unusually severe nature, by the use of examples for the categories listed in appendix J. For the purpose of this section, enviromental differential means additional pay authorized as specified in appendix J for a category of situations involving exposure to a hazard, a physical hardship, or working conditions of an unusually severe nature. . .
>
> d. (3) . . .
>
> Some of the enviromental differential listed in appendix J are payable whenever the criteria in the category definition are met. Others are payable only if protective facilities, devices, or clothing have not practically eliminated the hazard, physical hardship, or working condition of an unusually severe nature. Consistent with section S8-7g(3) below, determinations in this regard may be through negotiations at the local level. . .

At Chapter S8-7, subsection (g), the FPM also provides:

> g. Determining local situations when enviromental differentials are payable. (1) Appendix J defines the categories of exposure for which the hazard, physical hardship, or working conditions are of such an unusual nature as to warrant enviromental differentials, and gives examples of situations which are illustrative of the nature and degreee of the particular hazard, physical hardship, or working condition involved in performing the category. The examples of the situations are not all inclusive but are intended to be illustrative only.

(Continued)

Although the criteria for dirty pay was discussed Uesugi does not recall any mention of the FPM. Uesugi only responded that Respondent could not negotiate something that was illegal.

10. During the meeting Toyama also requested Respondent provide him with their proposals but management representatives replied that the subject was non-negotiable. Feeling assured that he could not change Respondent's mind, Toyama informed Uesugi that instead of providing his views at that time, he would put his position in writing. Uesugi agreed. Toyama's understanding when he left that meeting was that Respondent had already made its decision to terminate the dirty pay and that it would not negotiate over the matter.

11. There was also some discussion related to "poison pay" for the brushplating process, but only to the extent that the toxicity of

---

3/ (Continued)

> (2) Each installation or activity must evaluate its situations against the guidelines in appendix J to determine whether the local situation is covered by one or more of the defined categories.
>
> > (a) When the local situation is determined to be covered by one or more of the defined categories (even though not covered by a specific illustrative example), the authorized environmental differential is paid for the appropriate category. . .
>
> (3) Nothing in this section shall preclude negotiations through the collective bargaining process for:
>
> > (a) determining the coverage of additional local situations under appropriate categories in appendix J and application of appendix J categories to local work situations. For example, local negotiations may be used to determine whether a local work situation is covered under an approved category, even though the work situation may not be described under a specific illustrative example. (Emphasis added).

chemicals used in the process were concerned. Clearly "poison pay" was not discussed as an alternative to "dirty pay" although "poison pay" was mentioned during this meeting.

12. By letter dated August 18, 1980, Toyama objected to the discontinuance of dirty pay and suggested, "[i]f enviromental differential payments, dirty money is not warranted in brushplating process could low toxic environmental differential pay be warranted."

13. Respondent replied to the aforementioned correspondence on September 8, 1980. In this letter Respondent characterized the August 13 meeting as being convened to inform the Union of its plans to terminate differential payments. Using a definition of the National Wage Policy Committee for "Dirty Work," Respondent reiterated its position that the chemical used in typical brushplating operations did not constitute a work situation which would warrant "Dirty Work" pay. Respondent also concluded that chemicals used in brushplating work were not carcionogenic. Further, Respondent answered the query raised by Toyama regarding "poison pay" for brushplating by stating, "the chemicals used in brushplating work are considered irritants when in contact with the skin rather than toxic." Therefore, "Poison (toxic chemicals) - low degree hazard" pay for brushplating work may not be paid under the regulations." Finally, Respondent restated its position that the termination of dirty pay was "not a matter for negotiation," adding that dissatified affected employees could file a grievance under the parties negotiated agreement.

14. By letter dated September 12, 1980, the Production Shop Superintendent informed Toyama that while the decision to terminate dirty pay was intact, "it does appear that [the Union] desires that the Shipyard and [the Union] meet and confer regarding the applicability of this local work situation (brushplating) to the OPM "poison pay" criteria. I agree that the Shipyard and [the Union] should meet and confer regarding the coverage of this work situation under the "poison pay category in FPM Supplement 532-1, Appendix J. . ."

15. No further meetings were held regarding enviromental differential for dirty work, however Toyama states that in late September or early October he would from time to time bump into Uesugi or Herb Colwes, and that he did talk with these two about environmental pay, "but they did not want to negotiate it." According to Toyama, they were willing to negotiate poison pay. He however, maintained that "we needed to negotiate this dirty pay. If poison pay needed to be negotiated, that would be fine; but I wanted to negotiate the dirty pay. That was the issue." The testimony of both Colwes and Uesugi confirm these discussions.

16. Subsequently, Toyama filed the unfair labor practice charge concerned herein and 13 or 14 emloyees from Shop 38 filed grievances on poison pay or dirty pay.

17. NAVSHIPYD PEARL INSTRUCTION 12550.1B is a general Shipyard Instruction addressing the subject of enviromental differential pay. This instruction is general in nature and addresses the Shipyard policy and procedure concerning the payment of environmental differential setting forth guidelines for several categories of environmental differential, as well as for dirty pay. It contains schedules of Environmental Differential Pay which are almost identical, in many instances, to Appendix J of FPM 532-1, Subchapter S8-7, which it references. While its terms were not physically altered by the termination of dirty pay for brushplating, they probably should have been since the application of the Instruction to the brushplating work situation changed. According to Toyama, there are no other instructions in existence at the Shipyard which address the environmental differential for brushplating work.

Discussion and Conclusions

The undisputed facts of this case reveal that the payment of differential for machinists in Shops 31 and 38 was an established past practice at the Pearl Harbor facility. The record disclosed that such payments had been made to machinists in Shops 31 and 38, since the brushplating process was first introduced at the facility, approximately 6 years before the September 12, 1980, termination by Respondent. It is established under existed Federal Sector case law that such a past practice may not be changed without negotiation with the exclusive bargaining representative.

In denying the commission of the unfair labor practice herein, Respondent, did not contest the fact that an established past practice existed concerning payment of environmental differential for brushplating work, but asserted that a waiver exists or, in the alternative the matter should have been resolved under the procedure established by the parties to solve disputes under the agreement. The General Counsel contends that Respondent's unilateral termination of the environmental differential without affording the Union an opportunity to negotiate violates section 7116(a)(5) and (1) of the Statute. In addition the General Counsel urges a *status quo ante* remedy, as well as backpay for the machinists affected by the change.

The threshold question herein is whether the matter is one of contract interpretation and should rest in the grievance and arbitration procedures adopted by the parties for the resolution of such disputes.

The law leaves no doubt that alleged violations of a negotiated agreement which concerns differing and arguable interpretations of that agreement, as distinguished from actions which constitute fundamental, clear and unilateral breaches of the agreement, are not violative of the Statute and that, under such circumstances, the aggrieved parties remedy lies within the grievance machinery of the collective bargaining agreement, rather than through the unfair labor practice procedure. Social Security Administration, District Offices in Denver, Pueblo and Greeley, Colorado, et al, 3 FLRA No. 10 (1980); U.S. Patent and Trademark Office, 3 FLRA No. 123 (1980); Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma, 3 FLRA No. 82 (1980); United States Army Aviation Center, Fort Rucker, Alabama, 1 FLRA No. 98 (1979); Department of Health, Education and Welfare, Social Security Administration, 1 FLRA No. 37 (1979). In my view, the question whether there is a differing and arguable interpretation is not in issue. The issue is not whether the machinists would be entitled to environmental differential for the work they were performing but, whether or not Respondent unilaterally changed an established past practice without notification to or bargaining with the exclusive representative. The former issue is clearly one of contract interpretation, however, the discontinuance of an established past practice is properly before this forum.

I agree with the General Counsel that Respondent unilaterally made its decision to terminate "dirty pay" for brushplating work well in advance of its notification to the Union and that, the August 11 meeting was merely held to present a fait accompli to the exclusive representative. This position is confirmed by the factual posture of the matter and Respondent's representation that it did not intend to negotiate the matter but, merely intended to engage in "consultation" at that meeting. Under Respondent's interpretation of "consultation" it is abundantly clear that no bargaining was intended. Moreover, Respondent's position throughout, is that the payment was illegal and that it could not pay for the brushplating process. While this may be true, Respondent had several options including negotiation on the dirty pay or further negotiations to determine whether the brushplating process was low toxic and should have required environmental differential for poison pay. Poison pay negotiations, contrary to Respondent's assertion, were an afterthought raised by the Union President the day following the August 11 meeting and was not presented as a viable alternative to dirty pay at the August 11 meeting. Respondent's willingness to engage in poison pay negotiation at a later date has no bearing on its obligation to negotiate concerning dirty pay on August 11. In any event, it is clear from the record that Respondent conducted an independent audit and made its determination to terminate the differential pay unilaterally, without giving notification to or engaging negotiations with the Union. Furthermore, Respondent in a September 8 letter took the position that it would not negotiate over dirty pay for brushplating work although the FPM clearly provides for negotiations for such matters.

It is settled that absent a clear an unmistakenable waiver of bargaining rights an exclusive bargaining representative must be afforded notice and an opportunity to negotiate concerning a proposed change in employment conditions. Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA No. 2 (1981); NASA, Kennedy Space Center, Florida, A/SLMR No. 223, 2 A/SLMR 556, 569 (1972).

In its brief Respondent argues, that Article II, Section 3 of the parties agreement indicates a lesser duty of "consultation" resulting in a waiver of the duty to negotiate where management rights are concerned. Further, Respondent contends that since the environmental differential was inefficient and, since it could change "an existing rule or regulation to meet the Employer's needs, or the requirements of law, regulations of higher authority" no obligation existed for it to negotiate the termination of "dirty pay."

Contrary to Respondent's argument, I find nowhere in the agreement any language which specifically reserves to management the sole right to effect changes of environmental pay differential after merely notifying and "consulting" with the Union. Contrarywise the agreement in Article XXIII requires negotiation concerning environmental pay. Further, the FPM which controls environmental differential and on which both parties rely clearly provides for negotiations concerning such pay. Thus, the language of Article II and XXIII is inconsistent since it delimits the parties actual responsibility. In any event, the bargaining history of the parties does not spell out any clear or unmistakeable intention of the Union to waive its rights to bargain over a change in environmental differential. In the circumstances, it is my view that no clear or unmistakenable contractual waiver exists, and it is so found.

Respondent's argument that a factual waiver exists is also unpersuasive. In this regard Respondent recites facts which are themselves persuasive that no such waiver exists. Although the Union may well have responded that low toxic or poison pay might be an alternative, this was merely a suggestion. Further, the Union made it clear that it contended to explore whatever avenues were available and that a consideration of poison pay negotiations, in no way precluded negotiations on the "dirty pay" issue. Respondent's contention that a factual waiver existed is therefore rejected.

Based on the aforementioned, it is found that Respondent's conduct in unilaterally terminating the established past practice of paying environmental differential for dirty pay without notifying the exclusive representative of those employees and affording an opportunity to negotiate over the matter violated section 7116(a)(5) and (1) of the Statute.

Remedy

The Statute at Section 7118(a)(7) provides that back pay is an appropriate remedy where the unfair labor practice of an agency has resulted in loss of pay to the employee. The Statute also incorporates the back pay provisions appearing at 5 U.S.C. 5596 which, similarly, provides for back pay in instances where an employee has been adversely affected by an unfair labor practice.

The Authority has also held that where there are changes made unilaterally by an activity concerning negotiable matters, and where, but for the wrongful unilateral act, a loss of pay would not have occurred, the remedial order should include a return to the status quo ante, including back pay. Department of Defense, Department of the Navy, Naval Ordnance Station, Louisville, Kentucky and Local Lodge 830, International Association of Machinists and Aerospace Workers, AFL-CIO, 4 FLRA No. 100 (1980), U.S. Department of Commerce, National Bureau of Standards, Washington, D.C., and American Federation of Government Employees, Local 2186, Boulder, Colorado, 3 FLRA No. 98 (1980). The instant record supports a finding that "but for" Respondent's unilateral act in terminating the dirty pay, the machinists engaged in brushplating work would still be receiving the environmental differential and are, therefore, entitled to environmental differential pay for brushplating work from the date that it was unilaterally terminated with back pay the period from September 15, 1980, to the present.

The propriety of back pay for environmental differential for such work as performed by the machinists herein is covered by the FPM 532-1, Subchapter S8-7 where pay was unilaterally terminated by an activity, has already been approved, both by the Comptroller General and the Assistant Secretary in the Federal Sector cases. General Services Administration, Region 3, Washington, D.C., and American Federation of Government Employees, AFL-CIO, Local 2151, supra; Naval Air Rework Facility, Pensacola, Florida, supra, affirming the decision of the Comptroller General at 56 Comp. Gen. 8 (1976), supra, Headquarters, Sacramento Air Logistics Center, McClellan Air Force Base, supra. It is found that the factual situation is no different in this matter from those in the cited cases, and that the Statutory remedy set forth in Section 7118(a)(7) of the Statute may appropriately be applied. It is therefore found that back pay in this matter is appropriate, the exact amount to be determined at the compliance stage of this proceeding.

Accordingly, in view of the foregoing and having concluded that Respondent has violated section 7116(a)(5) and (1) of the Statute, I recommend that the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's regulations and section 7118 of the Statute, it is hereby ordered that Department of the Navy, Pearl Harbor Naval Shipyard, Pearl Harbor, Hawaii shall:

1. Cease and desist from:

(a) Unilaterally terminating environmental differential pay for the performance of brushplating work in Shops 31 and 38 without first notifying the Hawaii Federal Employees Metal Trades Council, the exclusive representative of the affected employees, and affording it the opportunity to negotiate concerning the elimination of such pay.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Upon request, meet and negotiate with the Hawaii Federal Employees Metal Trades Council, the employees exclusive collective bargaining representative, to the extent consonant with law and regulations, concerning elimination of environmental pay differential in connection with brushplating work in Shops 31 and 38 at the Pearl Harbor Shipyard.

(b) Rescind the September 8, 1980 memorandum terminating the environmental differential pay for the performance of brushplating work in Shops 31 and 38 at the Pearl Harbor Shipyard.

(c) Make whole employees for any loss of pay or benefits caused by the unilateral termination of environmental differential pay for brushplating work. The amount of back pay to be determined in accordance with the normal environmental pay formulas in effect prior to the termination of such pay in Shops 31 and 38 at the Pearl Harbor Shipyard.

(d) Post at Pearl Harbor Naval Shipyard, Pearl Harbor, Hawaii, copies of the attached notice marked "Appendix," on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Shipyard Commander and they shall be posted for 60 consecutive days thereafter in conspicuous places, including all places where notice to employees are customarily posted. The Shipyard Commander shall take reasonable steps to insure that such notices are not altered, defaced or covered by any other material.

(e) Notify the Federal Labor Relations Authority in writing within 30 days from the date of this Order as to what steps have been taken to comply herewith.

Eli Nash, Jr.

ELI NASH, Jr.
Administrative Law Judge

Dated: March 31, 1982
Washington, D.C.

[8-CA-753]

APPENDIX A

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER TO THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT unilaterally terminate environmental differential (dirty) pay from the performance of brushplating work in Shops 31 and 38 without first notifying the Hawaii Federal Employees Metal Trades Council, AFL-CIO, the exclusive representative of the affected employees, and affording it the opportunity to negotiate concerning the elimination of such pay.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce any employees in the exercise of the rights guaranteed by the Federal Service Labor-Management Relations Statute.

WE WILL rescind the September 8, 1980, memorandum eliminating the payment of dirty pay for the performance of brushplating work in Shops 31 and 38 at the Pearl Harbor Naval Shipyard.

WE WILL, upon request, meet and negotiate with the Hawaii Federal Employees Metal Trades Council, to the extent consonant with law and regulations with respect to any intended change in the payment of environmental differential (dirty) pay for brushplating work at Shops 31 and 38 at the Pearl Harbor Naval Shipyard, Pearl Harbor, Hawaii.

WE WILL make whole employees for any loss of pay or benefits because of our unilateral determination to cease paying environmental differential (dirty) pay for brushplating work in Shops 31 and 38. The amount of back pay to be determined in accordance with the normal environmental pay formulas in effect prior to the termination of the payment of environmental pay for brushplating work in Shops 31 and 38.

____
(Agency or Activity)

Dated: ____________________ BY: ____________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region 8, who address is: 350 South Figueroa Street, 10th Floor, Los Angeles, CA 90071, and whose telephone number is: (213) 688-3805

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Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 12

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

June 11, 1982

UNFAIR LABOR PRACTICE CASES

Case No. 6-CA-523 (June 11, 1982)

United States Department of Defense, Department of the Air Force, Carswell Air Force Base, Texas and American Federation of Government Employees, Local 1364, AFL-CIO

Case No. 6-CA-1209-2 (June 11, 1982)

United States Department of Defense, Department of the Army, Headquarters, III Corps and Fort Hood and American Federation of Government Employees, Local 1920, AFL-CIO

Case No. 7-CA-822 (June 11, 1982)

Department of Transportation, Federal Aviation Administration, Denver Tower, Colorado and Local 516, Professional Air Traffic Controllers Organization, AFL-CIO

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* THIS REPORT SERIES INCLUDES DECISIONS AND ORDERS OF FLRA ADMINSITRATIVE LAW JUDGES TO WHICH NO EXCEPTIONS WERE FILED WITH THE AUTHORITY WITHIN THE PRESCRIBED TIME LIMIT. IN ACCORDANCE WITH SECTION 2423.29(e) OF THE AUTHORITY'S RULES AND REGULATIONS, AS AMENDED (46 FED. REG. 40674 (1981)), THE FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS IN SUCH ALJ DECISIONS CONSTITUTE, WITHOUT PRECEDENTIAL SIGNIFICANCE, FINDINGS, CONCLUSIONS, DECISIONS AND ORDERS OF THE AUTHORITY.

Y3. F31/21-3:

[6-CA-523]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF DEFENSE
DEPARTMENT OF THE AIR FORCE
CARSWELL AIR FORCE BASE, TEXAS

(Respondent)

and

Case No. 6-CA-523

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1364, AFL-CIO

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding finding that the Respondent had not engaged in any unfair labor practice as alleged in the complaint, and recommending that the complaint be dismissed.

No exception to the Decision was filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (5 CFR 2423.29(1982)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., June 11, 1982

James J. Shepard

James J. Shepard, Executive Director

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

UNITED STATES DEPARTMENT OF DEFENSE
DEPARTMENT OF THE AIR FORCE
CARSWELL AIR FORCE BASE, TEXAS

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1364, AFL-CIO

Charging Party

Case No. 6-CA-523

John M. Bates, Esquire
For the General Counsel

Major Morris Tanner
For the Respondent

Mr. Carl W. Holt
For the Charging Party

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101, *et seq.*,[1] and the Rules and Regulations issued thereunder,

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[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statute reference, *e.g.*, 7116(a)(1) will be referred to, simply as "16(a)(1)".

5 C.F.R. §2423.1, et seq., was initiated by a charge filed on May 1, 1980 (G.C. Exh. 1(a)) which alleged violations of §§16(a)(1), (5) and (7) of the Statute. A First Amended charge was filed on June 17, 1980 (G.C. Exh. 1(d)) which alleged violations of §§16(a)(1) and (5) of the Statute. On July 18, 1980, an Order Consolidating Cases (Case Nos. 6-CA-523 and 6-CA-553), Consolidated Complaint and Notice of Hearing issued (G.C. Exh. 1(g)) which set the hearing for September 17, 1980. On October 14, 1980, an Order Severing Cases, Approving Withdrawal and Withdrawing Complaint issued (G.C. Exh. 1(k)) which, as to Case No. 6-CA-523, stated, in part, as follows:

> "On September 17, 1980 the Union filed a request for withdrawal of the charges filed in Case No. 6-CA-523. Moreover, on September 17, 1980, the parties entered into a Settlement Agreement in Case No. 6-CA-553. Accordingly:
>
> . . .
>
> IT IS HEREBY ORDERED that, pursuant to Section 2423.12 of the ... Regulations, the request to withdraw charges is approved and the Consolidated Complaint and Notice of Hearing in Case No. 6-CA-523 is hereby withdrawn." (G.C. Exh. 1(k)).

However, the Regional Director was apparently in error as, on October 17, 1980, an Amended Order Severing Cases, Approving Withdrawal and Withdrawing Complaint issued (G.C. Exh. 1(m)) which, as to Case No. 6-CA-523, deleted reference to Case No. 6-CA-523 and stated that, "On September 17, 1980, the Union filed a request for withdrawal of the Charges in Case No. 6-CA-553. Moreover, on September 17, 1980 the parties herein entered into a Settlement Agreement in Case No. 6-CA-553" and the request to withdraw charges was approved and the Consolidated Complaint and Notice of Hearing in Case No. 6-CA-553 was withdrawn. Although the Amended Order (G.C. Exh. 1(m)) is clear as to Case No. 6-CA-553, no reference was made to the prior withdrawal of 6-CA-523; however, the Regional Director either proposed a unilateral settlement and/or refused to "issue" a Complaint in Case No. 6-CA-523 as the Charging Party, American Federation of Government Employees, Local 1364 (hereinafter referred to as the "Union") filed an appeal to the General Counsel on November 15, 1980 (Res. Exh. 7), and on March 20, 1981, the Office of the General Counsel granted the Union's appeal (Res. Exh. 8) and remanded the case "for further investigation and appropriate action."

Accordingly, on June 25, 1981, a Complaint and Notice of Hearing issued in Case No. 6-CA-523, which alleged violations of §§16(a)(1) and (5) of the Statute and set the hearing for September 15, 1981, at a place to be determined (G.C. Exh. 1(o)). On August 15, 1981, an Order issued fixing a place for the hearing in Fort Worth, Texas (G.C. Exh. 1(s)); on August 26, 1981, an Order Rescheduling the hearing from September 15 to

October 29, 1981, in Fort Worth issued (G.C. Exh. 1(u)); on September 18, 1981, an Order issued Rescheduling the hearing to November 5, 1981 (G.C. Exh. 1(w)); on October 14, 1981, a further Order Rescheduling hearing, in this and other cases to December 14, 1981 issued (G.C. Exh. 1(y)); and on December 3, 1981, a further Order Rescheduling Hearing, in this and other cases, from December 14, 1981, to January 20, 1982, issued (G.C. Exh. 1(cc)) at a place to be determined. Finally, on January 14, 1981, an Order issued which set the hearing for January 20, 1982, in Dallas, Texas (G.C. Exh. 1(ee)), pursuant to which a hearing was duly held before the undersigned on January 20, 1982, in Dallas, Texas.

All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing on the issues involved, and were afforded opportunity to present oral argument. At the close of the hearing, February 23, 1982, was fixed as the date for mailing post-hearing briefs which time was subsequently extended, for good cause shown, specifically delay in receipt of the transcript, to March 2, 1982. Counsel for General Counsel and counsel for Respondent each timely mailed a most helpful brief, received on or before March 3, 1982, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

FINDINGS

1. In February, 1980, Sgt. Hearsie D. Sanders,[2] the new NCOIC of the hospital dining hall at Carswell, noted problems caused by the then current work schedule for civilian dining hall cooks under which the cooks alternated every other day from an early (5:30 a.m.) to a late shift (10:30 a.m.)[3] with fixed days off as follows: Sunday and Monday; Tuesday and Wednesday; Wednesday and Thursday; Friday and Saturday; and Saturday and Sunday. This meant that two were off on Saturday, Sunday and Wednesday and one was off Monday, Tuesday, Thursday and Friday; and inasmuch as the hospital population is lowest on Friday, Saturday and Sunday, the overall effect was to create an imbalance with more cooks on duty at various times when not needed, e.g. two on the late shift on Friday, and too few on duty when work was heavy, e.g. three on the early shift on Thursday and only one on the late shift and two on the late

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[2] At the time his rank was TSgt., USAF; however, sometime after April 8, 1980 (G.C. Exh. 5) and prior to November 28, 1980 (G.C. Exh. 8), he was promoted to MSgt. Neither the date of his promotion nor the fact of his promotion is material to any issue involved.

[3] G.C. Exh. 2 shows that Mr. Sanders for the second week worked the early shift continuously. If correct, this appears to have been an aberration. Compare, also, Res. Exh. 3.

shift and only one on the early shift on Wednesday of the first week on General Counsel Exhibit 2 (Tr. 70-71; 121). In addition, the schedule caused unequal distribution of work and did not give all cooks experience in preparing the wide range of menu items required by the dietetic requirements of the hospital for patient care. To solve these problems, Sgt. Sanders devised a new schedule consisting of five shifts with a cook assigned to each shift. On three shifts the hours were the same daily, i.e., one shift (S-1) was from 0530 to 1400; one shift (S-2) was from 0600 to 1430; and one shift (S-3) was from 1030 to 1900; and two (SS-1 and SS-2) were designated as swing shifts on which the hours varied to provide coverage when most needed, in part to cover the absences due to scheduled days off of the cooks assigned to Shifts 1, 2 and 3. Each shift had designated days off as follows: Friday-Saturday; Sunday-Monday; Tuesday-Wednesday; Thursday-Friday; and Saturday-Sunday. This meant that two were off Friday, Saturday and Sunday, one on Monday, Tuesday, Wednesday and Thursday. As a result, on Sunday one cook reported at 0530, one at 0600, and one at 1030; on Monday, Tuesday, Wednesday and Thursday one cook reported at 0530, one at 0600 and two at 1030; and on Friday and Saturday one reported at 0530, one at 0600, and one at 1030. Every 28 days the employees rotated to a different shift, e.g., the employee on S-3 rotated to S-2; S-2 to S-1; S-1 to SS-2; SS-2 to SS-1; SS-1 to S-1 (G.C. Exh. 3). As the scheduled days off were fixed by shift, obviously, when the employees rotated shifts their days off changed.

2. Prior to actually devising the new shift, Sgt. Sanders contacted Mr. Eugene Williams, an employee in medical supply and second vice president of the Union, and told him he was planning to make a shift change and asked Mr. Williams "what obligation did I have toward the Union or which I had to do as far as making a shift change" (Tr. 68) and Mr. Williams responded that "I had to give them, according to the agreement, at least seven days notice; but as long as I sat down and wrote up the proposal of what I wanted to do and submitted it to them, that it shouldn't be any problem." (Tr. 68).

3. Sgt. Sanders discussed his proposed rotating shift schedule with the employees on, or about, February 15, 1980, prior to its completion, and again on, or about March 1, 1980, when it was posted, to be effective March 9, 1980 (Tr. 75). At this meeting copies of the schedule (G.C. Exh. 3) were passed out to the employees (Tr. 23). On March 14, 1980, Sgt. Sanders received an informal grievance dated March 11, 1980 (Res. Exh. 1),[4] delivered to him by Mr. Williams (Tr. 75-76). This grievance stated, in part, as follows:

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[4] This grievance, which, in effect, became moot following the agreement of March 24, 1980, infra, was wholly separate and distinct from the grievance subsequently filed by the Union on July 23, 1980. The Union grievance of July 23, 1980, was ultimately taken to arbitration (G.C. Exh. 8).

> "It is understood fully that management has the right to change the schedule as it sees fit, but the cooks feel this would be a great morale booster and create better management and employee relationship if would go back to the previous scheduled days off." (Res. Exh. 1).

Sgt. Sanders responded on March 19, 1980, stating, in part, as follows:

> "... By assigning each civilian cook to a different shift for a period of 28 days ... I can identify who is responsible for work that is not completed ... and by rotating the shift the workload will be equal, and the time period on each shift will allow all cooks to be trained in all skills equally. At the present time we have cooks that are not familiar with the preparation of some food items on the menu. The menu cycle is 28 days. By working on each shift, all cooks will have an equal opportunity to work in preparation of all food items, and related job tasks there by enhancing their ability to perform all assigned tasks.
>
> . . .
>
> "In order for the cooks to keep the same days off, the shifts could not be rotated and the improvement we are trying to make may not be accomplished. Days off are assigned to the shift and not the individuals ... To change the days off in each shift everytime the cooks rotate would defeat the entire purpose of the new work schedule." (Res. Exh. 1, attachment).

4. On March 24, 1980, Mr. James F. Chambers, then President of the Union, and Mr. Ray Shoemaker, then Chief Steward (Tr. 26, 54) met with Sgt. Sanders. Also in attendance were Messrs. Briscoe, Smith, Villerreal, and Perry, four of the five cooks (Tr. 26, 39, 46, 77). Mr. Briscoe testified, in part, as follows:

> "At this time it was pointed out to Sergeant Sanders that he did not submit the schedule through proper channels for approval, and that the union wanted to negotiate about the new schedule that had been implemented.
>
> "At that time Sergeant Sanders agreed to return to the old schedule, the status quo, the early-late schedule, and at that time Shoemaker, chief union

> steward, suggested that he wait until the new pay period to implement it, and he agreed to it." (Tr. 26).
>
> . . .
>
> "At that time the chief union steward, Shoemaker, pointed out to Sergeant Sanders that he had not submitted the schedule through proper channels for approval and that the union wanted to negotiate on the schedule.
>
> "And at that time Sergeant Sanders agreed to return to the old schedule that we had worked previously." (Tr. 31).

Mr. Briscoe also admitted that Sgt. Sanders made it clear at that meeting that he intended to resubmit the new schedule to the Civilian Personnel Office for approval and to implement it (Tr. 39).

Mr. Chambers testified, in part, as follows:

> "A. Well, I brought it to his attention that he had changed the schedule without negotiating with the union and the fact that he had already committed an unfair labor practice, and we were kind of meeting with him informally to see if we could resolve the problem.
>
> . . .
>
> "A. Well, after I told him that and we discussed the situation, you know, quite thoroughly, he said, 'If that's the case, then I'll go back to the old shift tomorrow.'
>
> "At that time Ray Shoemaker, the chief steward, butted in and said, 'No, we're not asking you to go back that soon because it would cause lots of confusion. Why don't you change it back the way it was at the beginning of the next pay period,' which would have been on April the 6th.
>
> "So we all agreed to this.
>
> "I also told him that if he wished to make any changes in his shift or whatever, that he should submit these proposals to Civilian Personnel and they would get with me and we would negotiate." (Tr. 46-47).
>
> . . .

> "Q. All right. Now, in fact, at that meeting with Sergeant Sanders, didn't you also inform him that he had failed to comply with Air Force regulations concerning the promulgating of new schedules?
>
> "A. Air Force regulations?
>
> "Q. That's correct.
>
> "A. I'm not aware of that ....
>
> "Q. Are you aware of a requirement that the Civilian Personnel Office there approve schedule changes at Carswell Air Force Base?
>
> "A. Yes, I am.
>
> "Q. Did you point that requirement out to Sergeant Sanders at this meeting?
>
> "A. I'm not for sure whether I did or not." (Tr. 54-55).
>
> . . .
>
> "Q. At that particular meeting isn't it true that Sergeant Sanders told you that he would go through the proper steps to get this schedule implemented and then he would change the schedule?
>
> "A. No, I don't recollect him saying he was going to change it. He said he was having difficulty with training, but I had no idea at the time that he was going to go ahead ...." (Tr. 58).

Sgt. Sanders testified, in part, as follows:

> "A. At that particular meeting Mr. Chambers informed me that I had illegally or improperly implemented this particular schedule, that it had to go through Civilian Personnel for approval. It also was up for -- the union had the right to negotiate the impact of the schedule.
>
> "I told him I was not aware of that, but now that I was aware of that, we will go back to the old schedule, and we do plan to submit this through the proper channels in order to get it approved. Whatever is necessary for us to get this particular

> schedule approved, we will go back and research and find out and do that." (Tr. 77).

Sgt. Sanders made it clear that Mr. Chambers "did want to negotiate this change" (Tr. 103).

I found Mr. Briscoe and Sgt. Sanders very credible witnesses and, acccordingly, I fully credit their testimony. On the other hand, I did not find Mr. Chambers' testimony either wholly credible or convincing, in part, because it was contrary, in certain material respects, to the testimony of Mr. Briscoe and Sgt. Sanders. In addition, all of the evidence and testimony, except Mr. Chambers', shows that the failure to obtain approval of the new schedule by Civilian Personnel, as required by Respondent's Regulations, was the reason that Sgt. Sanders immediately agreed to go back to the old schedule. Mr. Chambers' uncertainty as to whether he mentioned this is simply not credible. Nor do I find convincing Mr. Chambers' denial that Sgt. Sanders on March 24, stated that he would go through the proper steps to get this schedule implemented. Indeed, Mr. Chambers' own testimony was that he "told him [Sgt. Sanders] that if he wished to make any changes ... he should submit these proposals to Civilian Personnel ...."

5. Pursuant to the agreement of March 24, the employees were informed at a Section meeting on April 1, 1980, that the Cooks and Food Service Workers would revert to the old schedule on April 6, 1980 (G.C. Exh. 4) and the schedule was posted (Res. Exh. 3).5/

6. In the meantime, on March 24, 1980, Sgt. Sanders prepared the new schedule for submission for approval by Civilian Personnel; it was submitted through the Executive Director, Health Services Management and Civilian Personnel received the request on March 26, 1980 (G.C. Exh. 7); and on, or about, April 2, 1980, the Office of Civilian Personnel approved the new schedule for Cooks and Food Service Workers6/ to be effective April 20, 1980 (G.C. Exh. 7). From the record it appears probable that: (a) Civilian Personnel gave Sgt. Sanders oral approval of the new schedule on, or about, March 28; and (b) that subsequently a proposed effective date (April 20) was agreed upon by Civilian Personnel and Sgt. Sanders, which effective date was approved April 2, 1980; however, since these details are not necessary for disposition of any

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5/ This schedule covered the period April 6 through April 26. Subsequently, the new schedule was approved by Civilian Personnel to be effective April 20, 1980 (G.C. Exhs. 5 and 6) and this schedule for April 20-26 was "x d" out, *i.e.*, deleted (Tr. 80).

6/ Although Food Service Workers were subject to related schedule changes on March 6, April 6 and April 20, 1980, as the cooks, Respondent's actions as to them is not challenged in this proceeding.

issue, I do not make specific findings with regard thereto and simply find that the new schedule, to be effective April 20, 1980, was approved on April 2, 1980, and was received by Sgt. Sanders on, or about, April 2, 1980.

7. Although, as set forth above, Sgt. Sanders made it clear at the meeting on March 24, 1980, that he intended to submit the rotating schedule to Civilian Personnel for approval, he did not advise the Union of his March 24, 1980, submission through channels; he did not furnish the Union with a copy of his submission on March 24, 1980; and Civilian Personnel did not advise the Union that it had received the request, that it had the proposed schedule change under consideration, or that it had approved the schedule change.

8. However, on April 8, 1980, at a Section meeting, Sgt. Sanders made the following announcement to the Cooks and Food Service Workers:

> "4. ANNOUNCEMENT: We have approval of the new schedule from Civilian Personnel. This schedule will go into effect on the 20th of April 80. The schedule has been gone over with everyone, but if you have any questions please ask." (G.C. Exh. 5).

The new schedule (G.C. Exh. 6) was posted (Tr. 34-35) and the April 20-26 segment of Respondent's Exhibit 3 was "x d" out.[7]

9. The following day, April 9, 1980, Sgt. Sanders personally delivered to Chief Steward Shoemaker a copy of the approved "Uncommon Tour of Duty", i.e., the submission of March 24 with endorsed approvals, including Civilian Personnel (G.C. Exh. 7) (Tr. 83-84). Not only was Sgt. Sanders' testimony uncontradicted but it was fully corroborated by

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[7] As the minutes show that the Section Meeting at which the announcement concerning the new schedule was made took place on April 8, 1980, rather than on April 15, 1980, as Mr. Briscoe testified (Tr. 33, 34, 35), I do not credit Mr. Briscoe's testimony in this regard and find, as the record clearly shows, that the employees were informed on April 8, 1980. Moreover, as Mr. Briscoe directly tied the date of posting of the new schedule to the date of the meeting, I conclude that the new schedule was posted on April 8, 1980. In addition, as Mr. Briscoe further testified that he contacted Mr. Shoemaker "after the meeting" (Tr. 36), I further conclude that he contacted Mr. Shoemaker on April 8, 1980, and not on April 15, 1980. However, I make no finding as to when the April 20-26 segment of Respondent Exhibit 3 was "x d" out for the reason that, beyond showing that it occurred prior to April 20, the record simply does not show when this segment was deleted although there is an inference that it may have been done before the new schedule was "put up".

the testimony of Major Saunders (Tr. 129-130). Immediately after delivery of the copy to Mr. Shoemaker, Sgt. Sanders went to the Union secretary to get Mr. Chambers' telepone number and while there the secretary told Sgt. Sanders that she had to go by Mr. Chambers' office on her way home and she offered to deliver the schedule to Mr. Chambers for Sgt. Sanders. Accordingly, Sgt. Sanders gave a copy to her to deliver to Mr. Chambers. Mr. Chambers admitted that "someone had dropped it by my shop" (Tr. 49). I do not credit Mr. Chambers' testimony that he did not receive this document until sometime after April 15, 1980; rather, I fully credit Sgt. Sanders' testimony that he delivered the document to the Union secretary on April 9, 1980; that he saw her leave the hospital at about 1400; and that he assumed that she was going to see Mr. Chambers, as she had represented, since her normal quitting time was 1430 (Tr. 85), from which I draw the inference that the document was, in fact, delivered to Mr. Chambers' office on April 9, 1980. But even if Mr. Chambers did not receive it on April 9, there is no doubt whatever that a copy was delivered to Chief Steward Shoemaker on April 9, 1980. Moreover, as noted above, the employees had been informed on April 8, 1980; the new schedule had been posted on April 8, 1980; and Mr. Briscoe had called Mr. Shoemaker on April 8, 1980.

10. Mr. Chambers testified that he went to the office of Mr. Lynn T. James, Chief, Civilian Personnel Branch, on April 15, 1980 (Tr. 47) and stated that he told Mr. James, "... they were changing the schedule at the hospital dining hall and we still hadn't negotiated the matter; and if they went ahead and implemented it like they intended on doing, I was going to file an unfair labor practice" (Tr. 47) and that Mr. James responded, "'My interpretation of the law is different from yours', ... 'but I will get back with you.'" (Tr. 47-48). Mr. James testified that Mr. Chambers called him on April 22, 1980 (Tr. 150) and, inter alia,

> "... mentioned ... that he was very upset that ... Sergeant Sanders had gone back and again reinstated the same shift... and that they weren't satisfied with it." (Tr. 150)
>
> . . .
>
> "... I remember Jim's conversation and the fact that he had indicated to me that Sergeant Sanders had already again implemented this second change, and that he was dissatisfied with it.
>
> "I asked him some questions at the time, if Sergeant Sanders had provided the information to him and all that sort of thing. "He said, 'Yes, but he did not assign the people according to seniority,' ...
>
> "If I remember, Jim wanted me to go over there and take charge of the organization and make them go

> back, and I said, 'Jim, I can't do that. I'm a staff agency; I'm not the management in the hospital. I can't do those things. It's my understanding from the information that I received from, Sergeant Sanders that, he did what he was supposed to. That's where I left it.
>
> "I did agree to get back with Jim to discuss some further conversation of what the interpretation or application of Article XXXV, Section 6 might be.
>
> "Q. Did he tell you in that conversation that the union did want to negotiate the change?
>
> "A. No, he did not.
>
> "Q. He didn't mention it?
>
> "A. He did not mention it.
>
> "Q. So your testimony is that at no time did he ever mention to you that the union wanted to negotiate the change?
>
> "A. That's correct.
>
> "Q. He did tell you he was unhappy with it, didn't agree to it, but he didn't tell you he wanted to negotiate?
>
> "A. Well, at the time that I talked to him, the schedule had been implemented; and, of course, he was still concerned ...." (Tr. 174-176).

There is no disagreement that the conversation between Mr. Chambers and Mr. James was the only conversation that took place between the Union and Respondent concerning the April 20, 1980, schedule change. Accordingly, the date of that conversation, whether in person or by telephone, is pivotal and, necessarily, depends almost wholly on a credibility determination. I do not credit Mr. Chambers' testimony. First, Mr. Chambers testified that he had written the unfair labor practice charge during the same week in which he had his conversation with Mr. James (Tr. 185). This was probably true; but, obviously, if the charge had been written in the same week that the conversation took place, the conversation could not been during the week of April 13-19 since the charge was dated April 25, 1980 (G.C. Exh. 1(a), Tr. 186). Nor was there any testimony, even after this discrepancy was highlighted, that the charge had been written on a date other than April 25, 1980.

Second, while Mr. Briscoe testified that he talked to Mr. Chambers, his testimony as to the time of his conversation with Mr. Chambers is uncertain, indeed, the only conversation clearly shown was after April 20. Thus, Mr. Briscoe testified, in part as follows:

> "A. Yes, the union steward, Shoemaker was contacted after the meeting with Sergeant Sanders.
>
> "Q. What did you say to Mr. Shoemaker?
>
> "A. The question was asked of the union steward, Shoemaker, what agreement had the union and

> management reached with the new schedule, and at the time he informed us that no agreement had been reached with management, and he referred me to the union president, Jim Chambers, to talk to him about it.
>
> "I contacted Jim Chambers and he informed me that the union had not approved of the new schedule and they had not negotiated with management on it (Tr. 36).
>
> . . .
>
> "Q. Following the date that the new schedule was implemented on April 20th, did the union president, Chambers, get back to you regarding the schedule change?
>
> "A. Yes. He contacted me and informed me -- at that time he informed me that the union had not approved of the new schedule and that the union had not negotiated with management on the new schedule." (Tr. 37).

Third, Mr. Chambers' testimony, that Mr. James' response to his statement that "... we still hadn't negotiated the matter" was that "My [James'] interpretation of the law is different from yours ... but I will get back with you.", is not convincing. It is wholly unrealistic that if Mr. Chambers had, in fact, requested negotiations prior to implementation he would not have insisted upon bargaining. The scope of bargaining, i.e., on the change itself or more narrowly on impact and implementation, may have been subject to dispute; but the right to bargain was not. Both the response of Mr. James and the absence of any demand by Mr. Chambers that they bargain strongly infer that Mr. Chambers did not request bargaining but, rather, had asserted, as Mr. James testified, that the change, which had been implemented, was contrary to Article XXXV, Section 6 (Res. Exh. 2, p. 39). Obviously, this parties had strongly divergent views as to the interpretation of the Article which was subsequently pursued to arbitration (G.C. Exh. 8).

Fourth, Mr. Chambers' testimony that,

> "What can you make proposals to when you don't have none." (Tr. 59)

and/or,

> "... I expected when I met with him that day that if management was going to bargain ... they would give me some proposals I could bargain over ...." (Tr. 65).

was a non sequitur. Obviously, if Mr. Chambers were requesting bargaining, the proposed schedule change constituted Respondent's proposal. While I would not, under the circumstances of this case, find that the Union's failure to submit proposals to management negated its right to bargain, Mr. Chambers failure to "make any proposal that they failed to negotiate about" (Tr. 66), casts further doubt on there having been a request to negotiate. Indeed, the grievance of March 11, 1980, had stated, in part, that, "It is understood fully that management has the right to change the schedule as it sees fit ...." (Res. Exh. 1). Although the March 11, 1980, grievance had been submitted to Sgt. Sanders by Mr. Wright and Mr. Chambers testified that he had not seen the grievance until sometime after he filed the unfair labor practice charge on May 1, 1980 (Tr. 53), such position, "that management has the right to change the schedule as it sees fit", was consistent with Mr. Chambers' not having requested bargaining and, rather, having asserted after implementation that such change was contrary to Article XXXV, Section 6, which provides that, "Transfers from shift to shift will be made available to employees according to their Service Computation date ...." (Res. Exh. 2).

Fifth, I found portions of Mr. Chambers' testimony concerning the March 24, 1980, meeting with Sgt. Sanders to have been in direct conflict with the testimony of Mr. Briscoe and Sgt. Sanders, which I credited, and, therefore did not credit Mr. Chambers; and I further did not credit Mr. Chambers' testimony that he did not receive General Counsel's Exhibit 7[8] until sometime after April 15, 1980. Moreover, the record firmly shows, as I have found, that a copy of General Counsel's Exhibit 7 was personally delivered to Chief Steward Shoemaker on April 9, 1980, and to the Union's secretary on April 9 for delivery to Mr. Chambers, which also casts doubt on Mr. Chambers' testimony that he was unaware of the proposed schedule change until his conversation with Mr. Briscoe. I find it difficult to believe that Mr. Chambers did not receive notice of General Counsel Exhibit 7 on, or about, April 9 either through Mr. Shoemaker, who received it on April 9, or by delivery by the Union's secretary, who received it on April 9 for the express purpose of delivery to Mr. Chambers that day. Mr. Chambers admitted that he received General Counsel Exhibit 7 and under the circumstances the presumption of delivery of the document on April 9 is persuasive, particularly as the secretary was not called as a witness. Nor, of course, was Mr. Shoemaker called as a witness.

On the other hand, I found Mr. James to be a wholly credible witness and, moreover, the entire record, including the grievance of March 11;

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[8] The apparent inference in General Counsel's Brief that "a copy of the new schedule" (G.C. Exh. 6) (G.C. Brief, p. 3) had been "dropped off for Chambers" rather than a copy of General Counsel's Exhibit 7 is not supported by the record (Tr. 48-49).

Sgt. Sanders' reply to the grievance of March 19; the meeting of March 24; the initiation on March 24 of the request for approval of the schedule change by Civilian Personnel; notice to employees on April 8 of the approval of the schedule change by Civilian Personnel; and delivery of copies of the approved schedule change to Chief Steward Shoemaker on April 9 and delivery on April 9 to the Union secretary for delivery to Mr. Chambers, is consistent with a conscious decision by Mr. Chambers to attack implementation as contrary to Article XXXV, Section 6. The record does not support General Counsel's assertion that there was any inconsistency between Mr. Chambers' affidavit and his testimony (see, Tr. 180).[9] I have no doubt, as Mr. James testified, that Mr. Chambers raised the question of proper notice, i.e., "telling me this had not been accomplished" (Tr. 151); indeed, Mr. Chambers stated that Article XXXV, Section 2 (one week's notice) had not been complied with, "not enough days in between the 15th and the 20th" (Tr. 57). While the question of notice could have been raised before implementation as well as after, it is inherently more probable that it was made after implementation for the reasons that: (a) Mr. Chambers had no incentive to give Respondent an opportunity to cure any defective notice; and (b) consistent with his action of March 24, he would more likely have used such defect, had there been a failure to give employees "one week's notice" (Tr. 94), after implementation to force a return to the "old" schedule, as he had been successful in doing on March 24 as to the failure to obtain approval of the schedule by Civilian Personnel. Because I found Mr. James' testimony wholly credible and consistent with the record as a whole and because I did not find Mr. Chambers' testimony either wholly credible or consistent with the record as a whole, I fully credit the testimony of Mr. James and find that the conversation took place on April 22, 1980, after the schedule had been implemented on April 20, 1980, and that Mr. Chambers asserted that the schedule change violated Article XXXV, Section 6 of the parties' agreement. I specifically do not credit Mr. Chambers' testimony that the conversation took place prior to implementation of the schedule change or that Mr. Chambers made any request to negotiate prior to implementation of the schedule change on April 20, 1980.

11. The record shows that on May 20, 1981, Respondent gave notice of a change of duty hours, brought about by the fact that the Base mess hall for enlisted personnel (Chevron Dining Hall) was to be closed for renovation and during the period of the renovation the hospital dining facility would serve all Base enlisted personnel as well as continuing its function for the hospital (Res. Exhs. 4 and 5). Mr. James M. Carter, who had succeeded Mr. Chambers as President of Local 1364, responded by letter dated June 2, 1981 (Res. Exh. 5) by which, as he testified, he

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[9] The affidavit was not introduced as an exhibit nor did I have any occasion to examine it. However, the testimony concerning the affidavit shows reference to both Section 6 and Section 2 of Article XXXV.

declined to negotiate, because he "... felt it was inappropriate to negotiate any changes at that time." (Tr. 188). General Counsel does not assert that the change of hours on, or about, June 4, 1981, constituted an independent unfair labor practice. Accordingly, I make no findings concerning this change of hours.

Conclusions

Although the record shows, and I have found, inter alia, that: (a) Respondent gave notice to the employees on April 8, 1980, that Civilian Personnel had approved the new schedule and that it would go into effect on April 20, 1980; (b) Respondent distributed copies of the new schedule (G.C. Exh. 6) to employees, and posted a copy, on April 8, 1980; (c) Respondent delivered to Chief Steward Shoemaker on April 9, 1980, a copy of approved "Uncommon Tour of Duty" (G.C. Exh. 7) and, also delivered a copy of the same document to the Union secretary on April 9, 1980, for delivery to Union President Chambers; and (d) the Union, although given notice on April 9, 1980, of the schedule change to be effective April 20, 1980, made no request to bargain prior to April 22, 1980, after the change had been implemented; nevertheless, whether Respondent violated its bargaining obligation under the Statute turns on whether Respondent was obligated to bargain on the change or whether the change was a reserved right of management, pursuant to §6 of the Statute, and Respondent was obligated to bargain only as to impact and implementation. If the latter, the Union, with adequate notice, by its failure to request negotiations on impact and implementation prior to implementation of the schedule change will be deemed to have waived its right to bargain, or, as the Authority has stated, "... the Union was obligated to request negotiations in order to give rise in Respondent's obligation to bargain", (Internal Revenue Service (IRS) and Brooklyn District Office, IRS, 2 FLRA 586, 589 (1980), and Respondent's implementation of the schedule change on April 20, 1980, was not in violation of §§16(a)(1) or (5). 4392 Aerospace Support Group, Vandenberg Air Force Base, California, Department of the Air Force, 2 FLRA 137 (1979); U.S. Department of Air Force, Air Force Systems Command, Electronic Systems Division, Hanscom AFB, Massachusetts, 5 FLRA No. 88 (1981); Department of the Navy, Portsmouth Naval Shipyard, 7 FLRA No. 129 (1982); Alabama National Guard, A/SLMR No. 660, 6 A/SLMR 267 (1976). If the former, Respondent was not free to change working conditions without first notifying the Union and, upon request, bargaining about such proposed changes before they were put into effect, Department of the Treasury, U.S. Customs Service, Region I, Boston, Massachusetts, 1 FLRA 397 (1979); Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 5 FLRA No. 48 (1981), and as Respondent announced the change to employees on April 8, 1980, albeit that the new schedule did not become effective until April 20, 1980, Respondent's announced unilateral decision without first affording the Union an opportunity to bargain was in violation of §§16(a)(5) and (1) of the Statute. Internal Revenue Service, 4 FLRA No. 68 (1980); Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA No. 2 (1981); see, also, General Services

Administration, 6 FLRA No. 77 (1981); Secretary of the Navy, Department of the Navy, Pentagon, A/SLMR No. 924, 7 A/SLMR 932 (1977).

This case arose under the Statute. The management rights provisions of Sections 11(b) and 12(b) of the Executive Order were re-written in different form in the Statute; however, as the legislative history, cited by the Authority in National Treasury Employees Union, Chapter 66, 1 FLRA 926, 929 (1979), shows, "... it was not our intention to substantively affect the status quo with respect to specific items contained in either of the sections involving items that are permissably negotiable." (124 Cong. Rec. H 9646 (daily ed. Sept. 13, 1978, Legislative History of the Federal Service Labor Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, Subcommittee on Postal Personnel and Modernization of the Committee on Post Office and Civil Service, House of Representatives, Committee Print No. 96-7, 96th Congress, 1st Session, [hereinafter "Legislative History"], p. 949). For ready comparison the provisions of the Statute and of the Executive Order are as follows:

Statute	Executive Order
§6(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency - (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and	§11(b) In prescribing regulations relating to personnel policies and practices and working conditions, an agency shall have due regard for the obligation imposed by paragraph (a) of this section. However, the obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; ... or its internal security practices ...."
(2) In accordance with applicable laws -	§12(b) "Management officials of the agency retain the right, in accordance with applicable laws regulations --
(A) to hire, assign, direct layoff, and retain employees in the agency, or to suspend, remove, reduce in-grade or pay, or take other disciplinary action against such employees;	(1) to direct employees of the agency; (2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;
(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall	(3) to relieve employees from

be conducted;	duties because of lack of work or for other legitimate reasons.
	(4) to maintain the efficiency of the Government operations entrusted to them;
(C) with respect to filling positions, to make selections for appointment from - (i) among properly ranked and certified candidates for promotion; or (ii) any other appropriated source; and	
(D) to take whatever action may be necessary to carry out the agency mission during emergencies.	§12(b) (6) to take whatever action may be necessary to carry out the mission of the agency in situations of emergency;
§6(b) Nothing in this section shall preclude any agency and any labor organization from negotiating - (1) at the election of the agency, on the numbers, types positions assigned to any organizational subdivision, work project, or tour or duty, or on the technology, methods, and means of performing work;	§11(b) [omitted above] and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; §12(b) (5) to determine the methods, means, and personnel by which such operations are to be conducted.
(2) procedures which management officials will observe in exercising any authority under this section; or	§11(b) This does not preclude the parties from negotiating agreements providing appropriate arrangements for employees adversely affected by the impact of realignment of work forces or technological change.
(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.	

Obviously, the Statute is different in some respects from the

Executive Order. For example, the provisions of the Executive Order which made "the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty", and "the technology of performing its work" (contained in §11(b)) nonnegotiable, except as to impact and implementation, under the Statute may, as well as "methods, means" (contained in 12(b)(5)), be negotiated "at the election of the agency." Congressman Udall, whose substitute was adopted, stated, Legislative History, pp. 954-955, that it was intended that the approach of the Council in 1 FLRC 235, 1 FLRC 219, 3 FLRC 325 and 1 FLRC 71, from which the Council had, too often, departed, should be followed; at that, as stated, in part, in the sectional analysis of H. Rep. 95-1403,

> "Section 7106 sets forth rights which are reserved to management. The effect of this section is to place limits on the number of subjects about which agency management may bargain with a labor organization.
>
> Section (a)(1) reserves to agency management the right (subject only to subsection (b) of section 7106) to determine the mission, budget, organization, numbers of employees, and internal security practices of the agency. Management may not bargain away its authority to make decisions in these areas.
>
> "Subsection (a)(2) sets forth the other areas of management authority which may not be subject to collective bargaining: (1) to direct employees; (2) to assign work, to make determinations with respect to contracting - out, and to determine the personnel by which agency operations shall be conducted; and (3) to take whatever actions may be necessary to carry out the agency's mission during national emergencies.
>
> . . .
>
> "The committee's intention in section 7106 is to achieve a broadening of the scope of collective bargaining to an extent greater than the scope has been under the Executive Order program, but to preserve the essential prerogatives and flexibility federal managers must have. ... The committe intends that section 7106 - which retains several of management's rights under the Executive Order, but also eliminates several - be read to favor collective bargaining whenever there is doubt as to the negotiability of a subject or a proposal." (Legislative History, pp. 689-690).

The provisions of the Executive Order as they related to changes of workweek and hours of duty of employees are unchanged in the Statute and, accordingly, the Authority's decision in Internal Revenue Service, Brookhaven Service Center, 5 FLRA No. 64 (1981), notwithstanding that it arose under the Executive Order, is applicable, although, for reasons set forth hereinafter, I find that decision distinguishable from the present case. Brookhaven had a Computer Branch staffed with regular tours of duty both on a 5-day per week, 24-hour per day basis, and on a 6-day per week, 24-hour per day basis. The amount of work to be completed required regular operation of both systems 7 days each week, with employees working Sundays receiving overtime. In order to reduce the use of overtime, IRS decided that it needed to schedule employees to work on weekends as part of their regular tours of duty. IRS met with the Union to inform it of its tentative plan to implement a schedule of coverage of Sunday operations on a regular basis instead of an overtime basis and to discuss impact and implementation. IRS requested that the Union submit written proposals concerning the proposed 7-day workweek, but the Union proposed that no change be made in existing tours of duty. IRS responded that its decision was nonnegotiable under section 11(b) of the Order and the change was implemented with three regularly scheduled shifts on Sundays. The Authority found that the decision was not excepted from the duty to bargain, stating, in part, as follows:

> "Contrary to the conclusion of the Administrative Law Judge, the Authority finds that the Respondent's decision is not excepted from the duty to bargain under section 11(b) of the Order. The Administrative Law Judge correctly identified the test to be applied, but he did not demonstrate how and in what manner the change in the basis workweek was integrally related to and determinative of the numbers, types, and grades of employees assigned to the Sunday shifts. In this regard, the facts herein are substantially similar to those in U.S. Naval Supply Center, supra. [1 FLRC 236 (1972)] In that case, the facility provided around-the-clock service to the fleet 7 days a week. The Union proposed to establish a basic workweek of five 8-hour days, Monday through Friday. The Agency argued that the proposal would require it to pay avoidable overtime for Saturday and Sunday work and, in addition, relying on the Plum Island case, argued that it was not required to negotiate on the establishment or change of tours of duty. The Council rejected this contention, finding no indication that the proposal to affirm Monday through Friday as the basic workweek would require bargaining on the 'numbers, types, and grades of positions or employees assigned to a ... tour of duty' within the meaning of section 11(b) of the Order.

> "More particularly, in American Federation of Government Employees, National Joint Council of Food Inspection Locals and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, 3 FLRC 325 (1975) ... the Union proposed a basic workweek of five 8-hour days, Monday through Friday, to begin at 6 a.m. and not commence after 6 p.m. on each Monday. Applying the principles of U.S. Naval Supply Center, supra, the Council found that the Union's proposal was not integrally related to the types of employees assigned to the proposed tours of duty, since the employees on each tour of duty would continue to be food inspectors; nor was it integrally related to the number of employees assigned to the proposed tours of duty, since the proposal related only to the days of the basic workweek, which had an impact on overtime costs, but not on the numbers of employees assigned.
>
> "The circumstances of the instant case are not materially different ... In this case, the Administrative Law Judge found ... that the decision ... would affect the amount of overtime to be paid. However, the Administrative Law Judge cited no evidence in the record in this case ... that the decision to change the basic workweek in itself was determinative of the numbers, types, and grades of employees assigned to the proposed tours of duty, i.e., in this instance, the proposed regular shifts on Sunday. Thus ... Respondent's decision to change the basic workweek to include regular tours of duty on Sunday is not excepted from the duty to bargain under section 11(b) of the Order.
>
> "In this regard, contrary to the Respondent's contention that, under the Council's Plum Island decision, it had a right under section 11(b) to establish a new tour of duty on Sunday, the record indicates that the Respondent had for sometime maintained such a tour of duty on an overtime basis. Thus, its decision herein did not involve the establishment of a new tour of duty but a change from scheduling an already established tour of duty on an overtime basis to scheduling it as part of a regular tour of duty, i.e., as a part of the basic workweek." (Internal Revenue Service and Brookhaven Service Center, 5 FLRA No. 64 at pp. 3-4.)

By contrast, Article XXXV of the parties' agreement provided for a "basic 40-hour workweek" (Section 1); and the workweek was defined as "seven (7) consecutive days, Sunday through Saturday. Normally, the basic workweek shall be scheduled on five (5) days and the two (2) days outside the basic workweek shall be consecutive except when the mission requirement dictate otherwise." (Section 2(2)). Respondent neither proposed nor did it make any change of the basic 40-hour workweek or the basic workweek "scheduled on five (5) days and the two (2) days outside the basic workweek shall consecutive". That is, unlike the situation in Brookhaven, supra, there was already in effect a 7-day workweek with each employee working a 40-hour workweek with two consecutive days off. There were two shifts - early (commencing at 5:30 a.m.) and late (commencing at 10:30 a.m.), with each employee alternating from early to late every other day, and with each employee having fixed days off. Respondent proposed a new schedule with five shifts (one commencing at 5:30 a.m.; one at 6:00 a.m.; one at 10:30 a.m. and two swing shifts: one commencing at 6:00 a.m. Sunday and Monday, 10:30 a.m. Tuesday and Wednesday, 5:30 a.m. Saturday; the other commencing at 10:30 a.m. Monday through Thursday and at 5:30 a.m. Friday); days off were fixed by shift; and the shifts rotated every 28 days. The establishment of the new shifts (tours of duty) related directly to the requirements of the hospital and the proposal was integrally related to and determinative of the staffing patterns of the hospital, i.e., "the numbers, types, and grades of employees assigned to any ... tour of duty ...." as to which Respondent could, at its election, negotiate, but was not required to negotiate, pursuant to §6(b)(1) of the Statute. The 6:00 a.m. tour of duty permitted Respondent to better distribute its workload both in the morning for breakfast, for lunch and for pre-preparation for the evening meal; and the two swing shifts permitted full staffing of each shift during all days of peak workload - Monday through Thursday and eliminated the imbalance that had existed previously. The rotation of shifts each 28 days permitted equal distribution of work and gave all cooks equal experience in preparing the wide range of menu items required for proper patient care. Because the new schedule provided that on Monday, Tuesday, Wednesday and Thursday, the days of maximum workload, one cook reported at 0530, one at 0600 and two at 1030; that on Friday, Saturday and Sunday one cook reported at 0530, one at 0600 and one at 1030, Respondent's proposal clearly concerned "the numbers, types, and grades of employees or positions assigned to any ... tour of duty" within the meaning of §6(b)(1) of the Statute. Consequently, in contrast to the situation in Brookhaven, supra, Respondent's proposal here was determinative of the numbers, types, and grades of employees assigned to each tour of duty. Moreover, Respondent's decision here did involve the establishment of new tours of duty, i.e., five tours of duty were established, three of which were for fixed starting times and two were swing shifts on which the hours varied; and days off were fixed by shift. The new tours of duty were determinative of the staffing patterns of the hospital and, therefore, Respondent's decision was excluded from the obligation to bargain, except at Respondent's election, by §6(b)(1) of the Statute. Alabama National Guard, A/SLMR No. 660, 6 A/SLMR 267 (1976); see, also, American Federation of Government Employees, Local 3669, AFL-CIO, 2 FLRA

640 (1980). Finally, Article XXXV of the parties' agreement contemplated, and, by clear inference, by agreement reserved to management the right to change tours of duty. Thus, in Section 2(1) it was provided that, "... a minimum of one week's notice will be given when employees are to be assigned to a different tour of duty or to different hours of duty. Changes in tours of duty shall be scheduled in accordance with applicable laws and regulations and posted in the work area and will contain the following:

> a. New hours of the tour
> b. Reasons for the change
> c. Signature of the 'Authorizing Official'".
> (Res. Exh. 2, Art. XXXV, p. 38).

Consistent therewith, the grievance of March 11, 1980, had stated, in part, "It is understood fully that management has the right to change the schedule as it sees fit ...." (Res. Exh. 1)

For the foregoing reasons, I conclude that Respondent's decision to establish the new tours of duty was a reserved right of management and that its bargaining obligation was to negotiate, upon request, only as to impact and implementation.[10] Good labor-management relations would have dictated the desirability of Respondent giving notice to the Union of its submission of the schedule change for approval, through channels, by Civilian Personnel on March 24, 1980, as Respondent subsequently did as to the 1981 change; nevertheless, Respondent gave notice to its employees on April 8, 1980, pursuant to Article XXXV, Section 2; and on April 9, 1980, delivered copies of its proposal, approved by Civilian Personnel, both to the Chief Steward of the Union and to the Union secretary for delivery that day to the President of the Union. With notice on April 9, 1980, of the proposed change to be effective April 20, 1980, the Union made no request to bargain on impact and implementation prior to implementation of the change on April 20, 1980, and accordingly, as the Union was obligated to request negotiations in order to give rise to Respondent's obligation to bargain, but failed to do so, Respondent did not violate either §16(a)(5) or (1) of the Statute by its implementation of the new schedule on April 20, 1980. Internal Revenue Service (IRS) and Brooklyn District Office, IRS, 2 FLRA 586 (1980); 4392

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[10] I express no opinion as to whether Respondent was obligated to bargain concerning its decision to rotate the shifts for the reason that no request was ever made to negotiate separately concerning shift rotation. To the contrary, I have found that the Union consciously elected to contest shift rotation as contrary to the already negotiated provisions of Article XXXV, Section 6 of its agreement. Following the refusal of the Regional Director to issue a complaint with respect to the alleged violation of Article XXXV, Section 6 (Res. Exh. 6), the issue was submitted to arbitration (G.C. Exh. 8).

Aerospace Support Group, Vandenberg Air Force Base, California, Department of the Air Force, 2 FLRA 137 (1979); *U.S. Department of Air Force, Air Force Systems Command, Electronic Systems Division, Hanscom AFB, Massachusetts*, 5 FLRA No. 88 (1981); *Department of the Navy, Portsmouth Naval Shipyard*, 7 FLRA No. 129 (1982); *Alabama National Guard*, A/SLMR No. 660, 6 A/SLMR 267 (1976). Therefore, it is recommended that the Authority issue the following:

ORDER

The Complaint in Case No. 6-CA-523 be, and the same is hereby, dismissed.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: March 26, 1982
Washington, D.C.

[6-CA-1209-2]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF DEFENSE
DEPARTMENT OF THE ARMY
HEADQUARTERS, III CORPS AND
FORT HOOD

(Respondent)

and

Case No. 6-CA-1209-2

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1920, AFL-CIO

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exception to the Decision was filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (5 CFR 2423.29(1982)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., June 11, 1982

James J. Shepard

James J. Shepard, Executive Director

[6-CA-1209-2]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

UNITED STATES DEPARTMENT OF DEFENSE
DEPARTMENT OF THE ARMY
HEADQUARTERS, III CORPS AND
FORT HOOD

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1920, AFL-CIO

Charging Party

Case No.: 6-CA-1209-2

Susan E. Jelen, Esquire
For the General Counsel

Sharon D. Hill, Esquire
For the Respondent

Mr. Herbert Stimmel
For the Charging Party

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101, et seq.,[1] and the Final Rules and Regulations issued thereunder, 5 C.F.R.

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[1] For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the Statute reference, e.g., Section 7116(a)(1) will be referred to, simply, as "16(a)(1)".

§2423.21, et seq., was initiated by a charge filed on June 3, 1981 (G.C. Exh. 1(a)), which alleged violations of §16(a)(1) of the Statute. A Complaint and Notice of Hearing issued on August 27, 1981 (G.C. Exh. 1(d)); the hearing was set for November 17, 1981, at a place to be determined; on October 17, 1981, an order issued setting the place of hearing in Temple, Texas (G.C. Exh. 1(g)); on October 28, 1981, an order issued cancelling the hearing for November 17, 1981, and advised that it would be rescheduled at a later date (G.C. Exh. 1(i)); on November 18, 1981, an Order issued rescheduling the hearing for January 15, 1982, in Temple, Texas (G.C. Exh. 1(h)); and on January 14, 1982, a further Order Rescheduling Hearing for January 18, 1982, at Fort Hood, Texas, issued (G.C. Exh. 1(m)), pursuant to which a hearing was duly held before the undersigned on January 18, 1982, at Fort Hood, Texas.

All parties were represented at the hearing, were afforded full opportunity to be heard, to examine and cross-examine witness, to introduce evidence bearing on the issues involved, and were afforded opportunity to present oral argument, which counsel for the parties each waived. At the close of the hearing, February 18, 1982, was fixed as the date for mailing post-hearing briefs which time was subsequently extended, upon timely motion and for good cause shown, to March 4, 1982. Counsel for General Counsel and Counsel for Respondent each timely mailed an excellent brief, received on March 8, 1982, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

FINDINGS AND DISCUSSION

As Counsel for the General Counsel stated at the commencement of the hearing, this case involves a single conversation, which occurred at about 4:00 a.m. on May 23, 1981, between Station Chief Edward W. Smith and fireman Clarence Daniel concerning fireman, and steward, David C. Weber, which was overheard by Mr. Weber. There is almost total disagreement between Station Chief Edward Smith and Mr. Weber as to what was said by Chief Smith on this occasion. If Mr. Weber's version is credited, there is no doubt that Station Chief Smith's statements violated §16(a)(1) of the Statute as alleged in Paragraphs 7 and 8 of the Complaint. On the other hand, if Station Chief Edward Smith's version is credited, it is equally clear that no violation of §16(a)(1) occurred.

Before considering the conversation of May 23, 1981, as to which, as noted above, there is almost total conflict of testimony, some background facts will be helpful to a better understanding of the circumstances which preceded the conversation in question. Mr. Weber testified that in March, 1981, he had been asked by Mr. Herbert Stimmel, President of Local 1920 (hereinafter also referred to as the "Union"), if he (Stimmel) could appoint him as steward (Tr. 13, 27, 28, 47-48); that he didn't know "exactly how I was going to feel about being a steward" (Tr. 47) so he talked to the men he would be representing and they all gave him encouragement (Tr. 47) and he also talked to Station Chief Smith about it (Tr. 48). Mr. Weber agreed to serve as steward and on April 2, 1981, Mr. Stimmel notified Mr. Howard D. Ritter, Civilian Personnel Officer, that he requested negotiations on the assignment of Mr. Weber as a new steward (Res. Exh. 1-b). A copy of this request was sent to Station Chief Edward Smith. By letter dated May 4, 1981 (Res. Exh. 1-a), Mr. Ritter approved the appointment of Mr. Weber. Although Mr. Weber's appointment as steward was not approved by Civilian Personnel until May 4, 1981, he acted as steward immediately after Mr. Stimmel talked to him in March; employees came to him with complaints and he dealt with Station Chief Edward Smith about various matters. Under the circumstances, as noted hereinafter, the fact that his appointment had not been approved at the time he handled various matters is immaterial as neither Station Chief Edward Smith, nor any other supervisor, questioned Mr. Weber's standing to present matters because he was not an approved steward.

On, or about, April 22, two drivers had come to Mr. Weber to try and get some safety defects corrected on their fire trucks. One, Mr. Barbre, complained of having to use a truck during a rain which had no windshield wipers on it; another complained that the throttle linkage on his truck stuck. Mr. Weber then went to Station Chief Edward Smith and asked if he could sit down and talk about the safety defects on the trucks. Station Chief Smith agreed and Mr. Weber testified that he told Chief Smith he wanted to work through the fire department to get the defects taken care of but if he, Chief Smith, "couldn't get it fixed or didn't get it fixed, that I was going to have to go to Post Safety with it, that I had a complaint on it." Mr. Weber stated that Station Chief Smith told him he would see what he could do and that he (Smith) did call Chief (Assistant Fire Chief) David Reavis; but Station Chief Smith" also indicated to me that he didn't think that the safety on these trucks was any of my business, me being a GS-4; he said it was his business, him being a captain out there at West Fort Hood." (Tr. 18). Station Chief Smith stated that he told Mr. Weber that they had been working with the shop on these problems for some time; that it was a matter of waiting on parts; that Mr. Weber said, ". . . something to the effect that well, he'd go take care of it; and I said no, that's not your place to take care of it, that's mine, and we are working on it and trying to get it done." (Tr. 73). Station Chief Smith further stated he ". . . didn't want him to go over and make Sonny mad at the Shop, as we were already working on it." (Tr. 73). Mr. Weber testified that he also went to Station Chief Tom Shelley and to Mr. Hansford Schmidt at Post Safety (Tr. 19), although Station Chief Smith testified that he was not aware of Mr. Weber having gone to either (Tr. 73-74). Whether as a result of his activity or the result of prior effort, Mr. Weber testified that on April 26 the truck sans wipers went to the Shop and the wipers were repaired and the following week the Number 1 pumper got a muffler and "within that month" the other defects, including the throttle which stuck, were repaired (Tr. 19).

Mr. Weber stated that the first business he conducted after Mr. Stimmel asked him to be a steward concerned a complaint from the GS-4s concerning dispatch duty. Station Chief Smith stated that it was Mr. Weber who was unhappy about the dispatch duty. The GS-4s handle the dispatch duties and once a week each GS-4 has the duty. He remains in the dispatch office from 6:45 a.m., when he comes on duty, until 4:00 p.m., except for periodic relief breaks; the GS-4s and 5s relieve him from 4:00 p.m. to 8:00 p.m. (Tr. 66), when he returns and remains in the dispatch office until relieved the following morning. There is a bed in the dispatch office and a color TV set. The fireman on duty at night can, and does, sleep subject, of course, to answering all calls. Mr. Weber sought to have the GS-5s share with the GS-4s performance of dispatch duties from 8:00 p.m. until relieved the following morning. Mr. Weber went to Station Chief Edward Smith to discuss this proposal sometime prior to April 20, 1981, and Station Chief Smith turned it down (Tr. 15), whereupon, Mr. Weber filed a grievance and met with Station Chief Smith on the first step of the grievance and Station Chief Smith called Assistant Fire Chief Reavis and told him that he had held the first step of the grievance (Tr. 15). Assistant Fire Chief Reavis subsequently came to the West Fort Hood Fire Station with Mr. John J. Irwin, a steward, and they conducted a survey, or vote, of B shift and all but one, who said nothing, were agreeable to the change (Tr. 15-16). Assistant Fire Chief Reavis reported the result to Fire Chief Wilkinson and Chief Wilkinson told Assistant Chief Reavis to check with A shift as well since they constituted half the people at West Fort Hood (Tr. 106-107). The supervisor of A shift made the same inquiry and "three or four people, I'm not for sure how many, off of A shift didn't want it changed." (Tr. 107); and three of them came to Chief Wilkinson, pretty mad over it, and told him "we want to leave it like it is." (Tr. 108). Assistant Chief Reavis again talked to B shift and "one guy . . . said 'I don't really want it changed.'" (Tr. 108). Accordingly, Chief Wilkinson decided to make no change. Station Chief Edward Smith learned of Chief Wilkinson's decision on the evening of May 22, 1981.

Prior to assignment to West Fort Hood, Mr. Weber had worked under Station Chief Gaylon Smith at Central (Tr. 95). Station Chief Gaylon Smith's appraisal for Mr. Weber for the first quarter of 1980 appears on Respondent Exhibit 3. Mr. Weber was transferred to West Fort Hood on December 14, 1980 (Tr. 59) and, accordingly, Station Chief Edward Smith did not give Mr. Weber a performance appraisal for the fourth quarter, i.e., the appraisal was marked "INSF" - insufficient opportunity to observe (Res. Exh. 3). Station Chief Edward Smith's first, and only,[2] appraisal of Mr. Weber appears on Respondent Exhibit 2. This appraisal covered January, February and March, 1981, and, while not dated (Tr. 60),

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[2] Mr. Weber suffered an employment related injury in July, 1981, and had not returned to duty at the time of the hearing. (Tr. 12).

Station Chief Smith stated it would have been given to Mr. Weber at the end of March or "sometime thereafter" (Tr. 79), not too long after the three month period (Tr. 79). Station Chief Edward Smith's appraisal of Mr. Weber was better than Station Chief Gaylon Smith's appraisal of Mr. Weber, although on item d, "Emotional Stability, Adjustment", which Mr. Weber testified concerned ability to work under emergency stress situations (Tr. 44), Station Chief Edward Smith had rated him "AVG" (Average) (Res. Exh. 2) as had Station Chief Gaylon Smith (Res. Exh. 3). Mr. Weber stated that about a month before he received this appraisal he had bid for a GS-5 driver's job and both Station Chiefs Gaylon and Edward Smith had rated him on an appraisal for the job, known as "Case-o sheet"[3] on each factor as better than average and on one as superior (Tr. 45). In part, because Mr. Weber felt that his ability to handle stress under emergency conditions was one of his strong points (Tr. 44) and, in part, because of his rating on the "Case-o sheet", Mr. Weber was dissatisfied with his appraisal, notwithstanding that Station Chief Edward Smith considered it a good performance appraisal (Tr. 61), and filed a grievance (Tr. 46, 61) which Station Chief Edward Smith denied at the first step (Tr. 46) and which, despite time extensions, was never taken beyond the first step and the time for doing so has expired (Tr. 47).

This was the background for the conversation of May 23, 1981. Mr. Weber had the dispatcher duty on May 22. He awoke at about 3:00 or 3:30 a.m. on the morning of May 23 and when Mr. Barbre got up, he asked him to stand by for him while he went to the kitchen for a cup of coffee (Tr. 21). Mr. Weber stated that while in the kitchen hall he saw Station Chief Edward Smith and fireman Clarence Daniel sitting in the kitchen at the table facing the television, with their backs to him, and heard his name mentioned, whereupon, he stood in the hall and listened. Mr. Weber testified, in part, that he heard the following:

> "A. Well, the first thing I heard was Chief Smith had asked Clarence Daniel, did I [Weber] find out about the dispatch office, what the Chief [Wilkinson] said about the dispatch office. He told Clarence it wouldn't change, and he said that'll put him in orbit when he finds out about that."
>
> . . .
>
> "A. Then he said, did you tell -- Clarence, somewhere during that month Clarence had called in late and I didn't know what reason, but he had indicated to Clarence that the Chief, the Assistant Chief

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[3] This job appraisal was not introduced as an exhibit and it was not shown whether the factors rated are the same as the factors rated on the Performance Appraisal.

knew that he was in jail that morning, called in late and that I was the one told the Chief and the Assistant Chief about it, and he indicated that I was supposed to be helping the people, not cutting them down, and he said he was going to find out if he could get a Union member to find out if I'd done that, and stand up for it, and then he was going to go to Irwin and see if he could get me kicked out of the Union.

. . .

THE WITNESS: I was supposed to have told about this employee being in jail, which I didn't know anything about. Chief Smith indicated to this Daniel that I had told the Assistant Chief and Chief he was in jail on some day he had called in late. I didn't have any idea about where Daniel was. I didn't even remember the time he was talking about.

BY MS. JELLAN (sic):

"Q. What else did Mr. Smith say?

"A. He told them that I was stirring up too much trouble, that being a Union steward, and that if he -- he said if some of the employees don't gripe about it, I can't -- he said he couldn't do nothing about it, because if nobody gripes about it -- he said he can hang my ass.

"Q. Who did he mean?

"A. He was talking about me, I guess, could hang his ass, is the way I interpreted it.

"Q. What else did he say?

"A. He also told him that he was going to write me a letter to the effect that if I didn't straighten up he was going to grade me marginal. And then he said the next time the grading comes up he was going to grade me marginal, and he said if he didn't like that last grading that I gave him, he said that ----- will go into orbit whenever he gets this next one.

"Q. Did Mr. Daniel say anything?

"A. He mumbled some, I never did understand anything, what he had said.

"Q. Did you understand what Mr. Smith was saying?

"A. I understood everything what Mr. Smith was saying.

"Q. What else did Mr. Smith say?

"A. Well, about this time Leroy Frye walked in, walked past me in the hallway, and he walked over to get him a cup of coffee. . . ." (Tr. 22-24).

Mr. Weber testified that Station Chief Edward Smith continued his conversation after Mr. Frye entered the kitchen. Mr. Frye testified that when he came to the kitchen at about 4:00 a.m., "Weber was standing at the door going into the dining room, at the edge of the door . . . He just motioned to me to be quiet" and when he [Frye] walked into the kitchen, "they [Smith and Daniel] turned and looked at me and then they stopped talking." (Tr. 92). Mr. Frye stated, "They didn't talk any more after I went in" (Tr. 92); and Mr. Frye stated he never remembered "having a meeting going off of work." (Tr. 94) and did not recall such a meeting on the morning of May 23 (Tr. 94).

Station Chief Edward Smith testified, in part, as follows:

"Q. Could you tell us the substance of your conversation that morning with Mr. Daniel?

"A. I really don't -- the only thing that I can recall was we were sitting there -- and, too, now, it was strictly with Mr. Daniel, no, with both of them sitting there. Someone, and I can't say which one because I don't remember, asked the question 'what was wrong with Mr. Weber's attitude the morning before, or the day -- all day yesterday,' we'll put it that way because this was 4:00 o'clock in the morning.

"And I made the comment that I guess it was on account of his grading and -- and I don't remember what transpired next, I don't remember anything sufficiently. We were watching TV, that was all that was said. I don't even remember what was on TV morning, it was some kind of a movie we was watching.

"But as far as concerning Mr. Weber, that was all that was said.

"Q. Okay. Did you discuss Mr. Weber's specific ratings with either of them?

"A. No.

"Q. Did you make any comment about his future ratings?

"A. No, I did not.

"Q. Did you indicate that you were going to speak to Mr. Irwin about Mr. Weber being a Union steward?

"A. No, I sure didn't.
. . ." (Tr. 63-74).

Station Chief Smith specifically denied each assertion made by Mr. Weber and in denying there was a meeting with all of the fireman at 6:00 o'clock, as Mr. Weber asserted was held (Tr. 25) and which Mr. Johnson C. Barbre testified was held (Tr. 116),[4] Chief Smith stated,

> "A. No. Now, and the reason -- that's a long time ago, but the reason I can say no right quick and definitely on this, that's when we turn the lights on in the morning; the men are getting up, they're making their beds, they're going to the bathroom, they're going to the kitchen to get them some coffee; and we never have had a meeting at 6:00 o'clock in the morning.
>
> "Q. And you're sure about that?
>
> "A. Yes." (Tr. 75).

Mr. Clarence Daniel, who declined voluntarily to appear and who testified only under subpoena, testified, in part, as follows:

> "Q. When you and Mr. Smith were in there waking up and drinking your coffee, do you recall a conversation regarding Mr. David Weber?
>
> "A. No, not really. All I heard at that -- that's all I heard, you know.
>
> "Q. What was all you heard?
>
> "A. All I heard is somebody had asked, I don't know who it was, asked what was going on and what was he disgrunted about.
>
> "Q. And what did Mr. Smith say to that?
>
> "A. I think -- he said 'I think it's about his grade,' and that's all I heard." (Tr. 83).[5]

---

[4] However, Mr. Barbre testified, contrary to Mr. Weber, that Chief Smith simply said that "the dispatch office, and hours where they worked" would remain the same. (Tr. 116, 117).

[5] I am aware that on recross examination by Ms. Jelen, the following colloguy ensued,

(Footnote 5 continued)

Mr. Daniel specifically denied that Chief Smith discussed Mr. Weber's grades with him (Tr. 83); did not remember any reference to dispatch work (Tr. 83, 84); did not remember Chief Smith saying that Mr. Weber was causing too much trouble (Tr. 84); never heard Chief say he was going to speak to Mr. Irwin about having Mr. Weber removed as a steward (Tr. 84); and otherwise did not recall any item alleged by Mr. Weber.

Mr. John J. Irwin testified credibly, and wholly without contradiction, in part, as follows:

> "Q. . . . Do you recall a conversation that you had with Mr. Smith regarding Mr. Weber?
>
> "A. Yes, I do.
>
> "Q. When was this?
>
> "A. This was approximately within two weeks after the incident in question. [May 23].
>
> . . .
>
> "Q. Okay, what did he say?
>
> "A. He mentioned Mr. Weber's name and said that Mr. Weber really had no business being a Union steward and wanted to know if there was any way he could be put out of the Union, since he was too hot-headed to hold that position.
>
> "Q. What did you say?

(Footnote 5 continued)

> "Q. When this issue first came up you gave an affidavit to one of our investigators with the Authority, is that correct?
>
> "A. Yes.
>
> "Q. At that time you could not recall the conversation, isn't that correct?
>
> "A. Right.
>
> "Q. And you still can't recall it at this point?
>
> "A. No, ma'am." (Tr. 89-90).

"A. I said there's nothing I can do about it; if you have any complaints call Mr. Stimmel. He's the one that decides the Union stewards.

"Q. Did Mr. Smith say anything further?

"A. No, he did not.

"Q. To your knowledge, did Mr. Smith take his complaints to the Union president?

"A. Well, I've asked Mr. Stimmel and he said that Mr. Smith had not contacted him." (Tr. 51-53).

Conclusions

I am aware that Mr. Weber testified that Station Chief Edward Smith had "been giving me some trouble since I had made this Union steward" (Tr. 32). That Chief Smith was annoyed by Mr. Weber's activity as steward was confirmed by his conversation with Mr. Irwin. Consequently, although in the main I found Station Chief Edward Smith a very credible witness, for example, I found his testimony, confirmed by Mr. Frye, that there was no meeting with all the firemen at 6:00 a.m. on May 23, 1981, persuasive and his explanation concerning the reason for not filling out the 2404 driver discrepancy sheet (Tr. 76-77) equally persuasive and I fully credit his testimony that he had advised all employees long prior to Mr. Weber's discussion of safety defects;[6] nevertheless, I credit Mr. Weber's testimony that Station Chief Edward Smith did say in effect that Weber was stirring up too much trouble as a steward; that he said he wanted to have him removed as a steward; and that he said that if Weber didn't like the last grading, he would go into orbit when he got the next one. To this extent, I do not credit Station Chief Smith's denials; nor do I credit his denial that he did not mention to Mr. Daniel Chief Wilkinson's decision on the dispatcher matter. I credit Mr. Weber's testimony in this regard for various reasons. First, Mr. Irwin's wholly unchallenged testimony shows both a strong dissatisfaction with Mr. Weber's activity as a steward and the fact that he actually went to Mr. Irwin about having Mr. Weber removed as a steward confirms Mr. Weber's testimony that he heard him discuss this with Mr. Daniel. Second, Station Chief Smith admitted that he referred to Mr. Weber's dissatisfaction with his grade. I do not find convincing the testimony that this was simply a response to a question as to what was wrong with Mr. Weber's attitude. Mr. Frye stated there was no conversation after he entered the kitchen, indeed, that when Station Chief Smith and Mr. Daniel saw him they had stopped talking. Under all circumstances, I find Mr. Weber's testimony, as noted, far more credible. Accordingly, I conclude that Station Chief Smith did say that Mr. Weber was stirring up too much trouble as a steward; that he wanted to have him removed as a steward; and that he said that if Weber didn't like his last grade, he would go into orbit when he got the next one, all of which constituted an implied threat of discriminatory action against Mr. Weber because of his protected activity as a steward in violation of §16(a)(1) of the Statute. In addition, his statement to Mr. Daniel that he wanted to have Mr. Weber removed as steward and his statement to Mr. Irwin that Mr. Weber was too hot-headed to be a steward also interfered with, restrained, or coerced the right of Mr. Weber, freely and without fear of penalty or reprisal, to act for a labor organization in the capacity of a representative. Moreover, such statements to another employee, Mr. Daniel, violated §16(a)(1) of the Statute and constituted a clear warning that any employee who incurred the displeasure of management as a Union representative could expect harsh treatment. General Services Administration, National Capital Region, 4 FLRA No. 69 (1980); San Antonio Air Logistics Center (AFLC), Kelly Air Force Base, Texas, 5 FLRA No. 24 (1981); Navy Resale System Field Support Office, Commissary Store Group, 5 FLRA No. 42 (1981); Internal Revenue Service and Brooklyn District Office, 6 FLRA No. 111 (1981).

---

[6] The record does not show the regulations involved. From prior experience, I assume, as Chief Smith stated, that listing of any safety defect does, indeed, "red line" the vehicle, i.e., cause it to be removed from service until: a) repaired; or b) certified as "safe".

In view of the above findings, it is unnecessary to reach other statements which Mr. Weber testified were made by Station Chief Smith, notwithstanding that, if made, would further show an intent to punish for engaging in representational activities.

Accordingly, having found that Respondent violated §16(a)(1) of the Statute, I recommend that the Authority issue the following:

ORDER

Pursuant to §2423.29 of the Rules and Regulations, 5 C.F.R. §2423.29, and §18 of the Statute, 5 U.S.C. §7118, the Authority hereby orders that the United States Department of Defense, Department of the Army, Headquarters, III Corps and Fort Hood shall:

1. Cease and desist from:

(a) Interfering with or discouraging, by implied threats or otherwise, David C. Weber, or any other employee, from exercising the right to act for a labor organization, freely and without fear of penalty or reprisal.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action:

(a) Post at its facilities at Fort Hood, Texas, including each Fire Station, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Chief of the Fire Prevention and Protection Division, Fort Hood, Texas, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted, including, but not limited to, each Fire Station at Fort Hood, Texas. The Chief of the Fire Prevention and Protection Division shall take reasonable steps to insure that said notices are not altered, defaced or covered by any other material.

(b) Pursuant to §2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region 6, P.O. Box 2640, Dallas, Texas, 75221, in writing within 30 days from the date of this order as to what steps have been taken to comply herewith.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: March 31, 1982
Washington, D.C.

[6-CA-1209-2]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with or discourage, by implied threats or otherwise, David C. Weber, or any other employee, from exercising the right to act for a labor organization, freely and without fear of penalty or reprisal.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of any right assured by the Federal Service Labor-Management Relations Statute.

____
(Agency or Activity)

Dated: _____________________________ By: ____
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If any employees have any questions concerning this Notice, or compliance with its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 6, whose address is: P.O. Box 2640, Dallas, Texas, 75221, and whose telephone number is: (214) 767-4996.

[7-CA-822]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
DENVER TOWER, COLORADO

(Respondent)

and

Case No. 7-CA-822

LOCAL 516
PROFESSIONAL AIR TRAFFIC CONTROLLERS
ORGANIZATION, AFL-CIO

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding finding that the Respondent had not engaged in any unfair labor practice as alleged in the complaint, and recommending that the complaint be dismissed.

No exception to the Decision was filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (5 CFR § 2423.29 (1982)), the findings conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., June 11, 1982

James J. Shepard

James J. Shepard, Executive Director

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
DENVER TOWER, COLORADO

Respondent

and

LOCAL 516
PROFESSIONAL AIR TRAFFIC CONTROLLERS
ORGANIZATION, AFL-CIO

Charging Party

Case No.: 7-CA-822

Walter L. George
For the Respondent

Gary Eads
For the Charging Party

Gavin K. Lodge, Esq.
James Gonzales, Esq.
For the General Counsel, FLRA

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §7101, et seq., 92 Stat. 1191 (hereinafter referred to as the Statute) and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, §2410 et seq.

Pursuant to a charge filed on October 20, 1980 by Professional Air Traffic Controllers Organization, Local 516, AFL-CIO (hereinafter called PATCO) against U.S. Department of Transportation, Federal Aviation Administration, Denver Tower, Colorado (hereinafter called FAA and/or Respondent) the General Counsel of the FLRA, by the Director of Region 4, issued a Complaint and Notice of Hearing on February 25, 1981. The Complaint alleges that Respondent violated Section 7116(a)(1) of the Statute by advising a PATCO representative that FAA would have edited foul language of an air traffic controller from a recording tape, except for the fact that PATCO filed certain grievances. FAA filed an Answer denying that FAA had violated the Statute.

A hearing in this matter was conducted before the undersigned in Denver, Colorado.[1] The General Counsel of the FLRA, Respondent and PATCO were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Post hearing briefs were filed and have been fully considered.[2]

Based upon the entire record in this matter, my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following:

---

[1] On the same day a hearing was held in Department of Transportation, Federal Aviation Administration, Denver Tower, Colorado and Local 516, Professional Air Traffic Controllers Organization, AFL-CIO, Case No. 7-CA-823. Cases Nos. 7-CA-822 and 7-CA-823 were not consolidated for trial. Although it was indicated on the record that one decision would issue covering both cases, it is now determined that because the cases were not consolidated, a separate decision should issue for each case. It is noted, however, that the formal papers in Case No. 7-CA-822 are bound with the formal papers in Case No. 7-CA-823.

[2] On November 20, 1981 the undersigned issued an Order to Show Cause granting all parties until December 21, 1981 to submit briefs and statements of position with respect to whether, in light of Professional Air Traffic Controllers Organization and Federal Aviation Administration, 7 FLRA No. 10 (1981), the complaint in the subject case should be dismissed. General Counsel filed a response wherein it urged that the subject Complaint should not be dismissed since the gravaman of the complaint is a violation of Section 7116(a)(1) of the Statute with respect to a threat of reprisal against an individual employee for engaging in a protected activity. No other party filed a response. After due consideration it is concluded that Professional Air Traffic Controllers Organization and Federal Aviation Administration, supra, does not compel dismissal of the subject complaint.

Findings of Fact

PATCO was at all times material herein the collective bargaining representative for a unit of employees that included the air traffic controllers employed by FAA at the Denver Tower.[3]

On Sunday, September 21, 1980, an aircraft incident occurred in Denver, Colorado which involved a helicopter descending almost to the level of the top tier of bleachers at Mile High Stadium. An aircraft incident involves an aircraft accident or potential accident, including an aircraft's flying or hovering dangerously close to the ground, to buildings, or to other aircraft. Air traffic controller specialist David Rambeau, who was also vice-president of PATCO, was on duty at the time and monitoring the activity of this particular helicopter. In the course of trying to locate this helicopter, Rambeau talked over land lines (a ground radio network), to some Denver-area satellite airports for help in locating the subject aircraft. During the course of this communication Rambeau used some obscene language.[4] In another incident he recommended an altitude of 5200 feet to a pilot, 5200 feet being 80 feet below ground level in Denver. All Denver Tower land line and aircraft radio traffic is recorded on tape recorders, and in the event of an aircraft incident, all tapes with any communications relating to the incident are kept by Denver Tower for review in analyzing the incident. These tapes are not edited or "cleaned up" but rather are carefully kept. The tape in question was sent to the FAA Regional Office and was already in the Regional Office by September 26, 1980.

On September 26, 1980, PATCO president Colin Smith and vice-president Rambeau met in Denver Tower chief Temple Johnson's office with Johnson and deputy chief Walter Rusch. The announced purpose of the meeting was to discuss some employee grievances. At such meetings, Smith's usual function was to present PATCO's side of the grievances in question, while Rambeau observed and took notes. At one point in the meeting, while Smith was presenting a grievance concerning management's administration of tours of duty and work breaks, Smith cast aspersions on the competency and ability of some Denver Tower supervisors to adequately police tours of duty and breaks. Immediately Johnson asked the PATCO president's opinion of an air traffic controller who used such language over the Denver Tower's land lines as "A-rape-a-hoe" when referring to Arapahoe County Airport and "Fuckley Bield" instead of Buckley Field. Smith, who know nothing about the tapes or Rambeau's language relating to the September 21 aircraft incident, said he did not condone such language and he did not think it was professional, but he reminded Johnson that PATCO was at a meeting to present grievances. Johnson continued to press the matter of Rambeau's language over the land lines, and he told Smith that "the guy on your left", i.e., Rambeau, was the controller who had used profanity on the land lines. Johnson went on to ask Rambeau what he thought of such actions, and, alluding to Rambeau's PATCO jacket bearing the PATCO motto "The Proud Professionals", he asked the PATCO representatives how they could consider themselves to be "proud professionals". Johnson, in a louder, agitated voice, told Smith that FAA had tapes with Rambeau using the questionable language, and then he turned to Rambeau, and Johnson stated that he was so embarrassed he wished the tapes could have been cleaned up. At this point, Smith announced that the meeting was over, and he and Rambeau left Johnson's office.

---

[3] It is noted that PATCO is no longer the collective bargaining representative for FAA's controllers and is no longer a labor organization. *Professional Air Traffic Controllers Organization and Federal Aviation Administration*, *supra*.

[4] Such language is apparently not unusual among air traffic controllers.

With respect to the September 26, 1980 meeting, I credit Johnson's version and reject the versions of Rambeau and Smith. Johnson was not only the most credible witness, his version, that he merely stated he was so embarrassed that he wished he had been able to clean up the tape, was consistant with the undisputed facts that at the time of the meeting the tape was already at the Regional Office and that such tapes cannot be edited or cleaned up. The testimony of Rambeau and Smith that Johnson stated he would have edited and cleaned up the tapes but for the frivolous nature of the grievances the PATCO representatives were raising is not consistant with the surrounding circumstances and is rejected.

Discussion and Conclusions

Counsel for the General Counsel of the FLRA alleges that FAA violated Section 7116(a)(1) of the Statute when Johnson allegedly stated he would have cleaned up Rambeau's tape but for the nature of PATCO's grievances. In effect Johnson was allegedly stating that he was punishing Rambeau for engaging in an activity, processing grievances, protected by the Statute. However, because it is concluded that Johnson made no such threat or statement, but merely stated that he was embarrassed by Rambeau's statements on the tape, General Counsel's contention is rejected.

Accordingly it is concluded that Respondent did not violate Section 7116(a)(1) of the Statute and I recommend that the FLRA adopt the following:

ORDER

It is hereby Ordered that the Complaint in Case No. 7-CA-822 be and hereby is, dismissed.

Samuel A Chaitovitz
SAMUEL A. CHAITOVITZ
Administrative Law Judge

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Dated: February 8, 1982
Washington, D.C.

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Federal Labor Relations Authority

Washington, D.C. 20424

Number 13

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

September 10, 1982

UNFAIR LABOR PRACTICE CASES

Case No. 2-CA-951 (August 30, 1982)

Department of the Navy, Naval Air Development Center and American Federation of Government Employees, Local 1928, AFL-CIO

Case No. 3-CA-1269 (August 30, 1982)

Social Security Administration and American Federation of Government Employees, AFL-CIO

Case No. 4-CA-826 (August 30, 1982)

Department of Defense, Department of the Navy, Naval Air Station and American Federation of Government Employees, Local 1960, AFL-CIO

Case No. 5-CA-1129 and 5-CA-1131 (August 27, 1982)

Department of the Air Force, Scott Air Force Base, Illinois and National Association of Government Employees, Local R7-23

Case No. 8-CA-20003 (August 27, 1982)

Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, AFL-CIO

Case No. 9-CA-126 (August 27, 1982)

Department of Justice, Immigration and Naturalization Service, Washington, D.C. and San Francisco, California and American Federation of Government Employees, AFL-CIO

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* THIS REPORT SERIES INCLUDES DECISIONS AND ORDERS OF FLRA ADMINSITRATIVE LAW JUDGES TO WHICH NO EXCEPTIONS WERE FILED WITH THE AUTHORITY WITHIN THE PRESCRIBED TIME LIMIT. IN ACCORDANCE WITH SECTION 2423.29(c) OF THE AUTHORITY'S RULES AND REGULATIONS, AS AMENDED (46 FED. REG. 40674 (1981)), THE FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS IN SUCH ALJ DECISIONS CONSTITUTE, WITHOUT PRECEDENTIAL SIGNIFICANCE, FINDINGS, CONCLUSIONS, DECISIONS AND ORDERS OF THE AUTHORITY.

Y 3.F 31/21-3:

[2-CA-951]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE NAVY
NAVAL AIR DEVELOPMENT CENTER

(Respondent)

and

Case No. 2-CA-951

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1928, AFL-CIO

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on June 2, 1982, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (5 CFR 2423.29 (1982)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusion, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violation and take affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., August 30, 1982

James J. Shepard

James J. Shepard, Executive Director

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

DEPARTMENT OF THE NAVY
NAVAL AIR DEVELOPMENT CENTER

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1928, AFL-CIO

Charging Party

. . . .

Case No. 2-CA-951

Joseph Dallas, Esq.
For the Respondent

Robert J. Fabii, Esq.
Lee Mingledorff, Esq.
For the General Counsel

Martin R. Cohen, Esq.
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute (herein called the Statute or the Act). It stems from a first amended charge filed on June 18, 1981 by American Federation of Government Employees, Local 1928, AFL-CIO (herein called the Union) against Department of the Navy, Naval Air Development Center (herein called the Respondent).

The Complaint and Notice of Hearing, predicated on said amended charge, was issued on September 30, 1981 by the Regional Director for the

Federal Labor Relations Authority, New York, New York Region. It was alleged therein that on or about May 12, 1981 Respondent unilaterally changed a past practice whereby 100 percent of the time spent by the President of the Union had been on representational duties on the Union's behalf; that Respondent no longer permitted the said President to spend 100 percent of his time on such duties; and that Respondent has refused to negotiate the substance, impact and implementation of such changes. Such acts were alleged to be in violation of Sections 7116(a)(1) and (5) of the Statute.

Respondent's answer, dated October 15, 1981, denied the aforementioned allegations as well as the commission of any unfair labor practices.

A hearing herein was held before the undersigned on December 1, 1981 at Philadelphia, Pennsylvania. All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. No briefs were filed with the undersigned.[1]

Upon the entire record herein, from my observations of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions.

Findings of Fact

1. At all times material herein the Union has been and still is, the collective bargaining representative of all employees of the Naval Air Development Center, Warminster, Pennsylvania excluding supervisors, foreman, management officials, confidential employees and other exclusions specified in a written collective bargaining agreement between the parties.

2. Both the Union and Respondent are parties to a written collective bargaining agreement entered into on November 22, 1978, and which by its terms, continued in effect thereafter for a period of three years. Article XI of the said agreement, entitled "Union Representation", provides in pertinent part as follows:

> Section C: It is agreed that the Union Stewards will be granted reasonable time to discuss appropriate matters under the terms of this agreement with the Chief Steward, other local officers or the employees of the Unit. The Union and the Employer have the responsibility to assure the judicious use of official time granted to Union officials and representatives to

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[1] Charging Party filed a "post-hearing submittal" requesting specific relief herein.

> carry out labor-management relation functions. The following guidelines are set forth so that an orderly procedure can be adhered to by employees, Union representatives, management officials and supervisors in discussing Union related matters.
>
> > 1. When it becomes necessary for Union representatives to become involved in discussion regarding Union business either in their immediate work area or outside their immediate work area, they shall first obtain permission from their immediate supervisors. Upon completion of such discussions, Union representatives will inform their immediate supervisors that they are returning to work.

* * *

3. At all times material herein William Sposato has been, and still is, employed by Respondent as a physicist at its Warminster, Pennsylvania Development Center. Since 1976 Sposato has been, and continues to be, president of the Union herein. Moreover, since at least July 1979, office space, together with a desk, was reserved to Sposato for conducting union business at the Center. It was customary for the Union official to report directly to this office when arriving at the Center, and his testimony reflects that he never checked with his supervisor before doing so. Further, prior to April 1981, Sposato was never questioned by his supervisor as to the amount of time spent on union business.

4. Record facts as shown on the Hourly charges between the years 1977-1981 reflect that Sposato's percentages of time spent on union activities,[2] work, and other matters were as follows:

1977 - 44 percent of time devoted to union activities
35 percent of time devoted to work
21 percent of time devoted to other[3]

1978 - 51 percent of time devoted to union activities
7 percent of time devoted to contract negotiations
16 percent of time devoted to other

---

[2] The Union activities included, in addition to negotiations with management, discussing grievances with employees and representing them in connection therewith.

[3] The term "other" refers to such items as holidays or leave.

24 percent of time devoted to matters not involving work or union representation[4]

1979 - 64 percent of time devoted to union activities
14 percent of time devoted to non-union representation
7 percent of time devoted to work
15 percent of time devoted to other

1980 - 88 percent of time devoted to union activities
12 percent of time devoted to other

1981
(January 1 thru May 16)

- Virtually all of Sposato's hours, except for leave and holidays, were spent on union activities during this period.

5. In an intra-agency memorandum dated March 28, 1978 Commander Rigsbee of the Center directed all supervisors to keep records of time spent by employees in representational duties. The supervisors were also ordered to inform employees that they must request permission to leave the worksite for such dates, as well as notify the supervisors upon their return.

6. In a memorandum dated May 16, 1978 the Commander notified Sposato that supervisors would be directed to explore the reasons for union officials leaving work areas to conduct union business, the time required, and where the officials would be located. The Commander questioned the propriety of several union officials conducting union business off the job. He stated that these individuals claimed to have been assisting Sposato in responding to proposed activity instructions; that since Sposato spent considerable time handling such responses, no valid reason appeared for these individuals to do likewise.

7. A meeting was also held on May 16, 1978 between Respondent's officials and union agents, including Sposato. Rigsbee mentioned that officers and stewards have been, in the past, leaving work area to do union business after notifying their supervisors but not requesting permission to do so; that this is inconsistent with the contract and may not be done in the future. He also stated that too much time is spent by some union officers performing union business, and that some of the time

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[4] This percentage involved such items as time spent negotiating a contract, assistance to employees having problems because of drugs or alcohol, and an erroneous percentage charged to Sposato's time card by the Civilian Personnel Office.

spent does not involve legitimate union business. Rigsbee further commented that supervisors would inquire as to the nature of such business and approve or disapprove request based on contract terms.

8. On April 27, 1981 supervisor John Smith spoke to Sposato re his representational duties. Smith told the union official that he had talked with civilian personnel who directed him to ask Sposato to perform his duties as expressed in his position.

9. A meeting was held on May 1, 1981 to discuss Sposato's assignments. It was attended by Joseph Lyons, supervisor of the radar division, John Smith, Mary Swanchack, 2nd vice president of the Union, and Sposato. Lyons stated that in order to be evaluated for performance, Sposato must perform, in the future, more than 50 percent of technical work versus representational functions. The Union president commented he had been on 100 percent official time and that 50 percent would not be an acceptable change.

10. In early 1981 Ed Yannuzzi became Director of Sensors and Technology, the department with which Sposato was affiliated. The record reflects Yannuzzi was not then aware of the fact that Sposato was spending 100 percent of his time on union business. He learned of this when preparing the budget in early April or May of that year. The Director became concerned and mentioned it to supervisor Smith; also, Yannuzzi commented that the contract provided union officials must obtain permission from supervisors to leave the work area, and this provision should be followed.

11. As a result of the foregoing discussion Smith and Yannuzzi met with Robert J. Carroll, manager of employee labor relations for Respondent on several occasions. Both officials asked Carroll if 50 percent would be reasonable amount of time to spend on union business; and the manger declared that, depending on the Union workload and his tasks as a physicist it could be a reasonable percentage.

12. Two meetings were called by management on May 7, 1981 re Sposato's use of official time. The earlier one was attended by Ed Yannuzzi, Director of Sensors and Technology, Commander Nortflete, Deputy Director of Sensors and Technology, supervisor Lyons, attorney Peter Broda and Sposato. The latter was advised that the meeting was called to inform him that Captain Dudley, Commanding Officer of the Center and other offices had decided that commmencing May 11, Sposato would spend 50 percent of his time on union business and the remaining 50 percent on technical work. No comment was made by Sposato to management in reply thereto.

At a second meeting on that date between management officials and union representatives, attorney Peter Broda asked Captain Dudley if he realized the agency was changing a past practice unilaterally which would result in an unfair labor practice charge being filed. Dudley replied: "that's the way its going to be."

13. A memorandum dated May 12, 1981 was sent to supervisor Smith from labor-relations manager Carroll re "Reasonable Time as related to Union President." Reference was made therein to the meeting held on April 10, 1981 among the various managerial personnel, at which time they agreed it was reasonable to expect Sposato to spend 50 percent of his time on assigned tasks. Carroll stated in said memorandum that he changed his position since "the unilateral determination by management of what is reasonable time for Mr. Sposato to spend on Union representational functions would be an unfair labor practice." He further commented that "reasonable" cannot be defined with Sposato; that the amount of reasonable time should be fixed by considering workload priorities related to Sposato's tasks and the time he request to accomplish representational duties.

14. Supervisor Smith wrote a memorandum dated May 12, 1981 which was addressed to Sposato via Lyons and Yannuzzi. It was stated therein that while Smith had requested Sposato spend 50 percent or more of his time on project work, the Civilian Personnel Office advised him that such a specific time for assignment of work was inappropriate. However, since the time of professional personnel must be utilized effectively, Smith mentioned he was assigning Sposato a project involving five task sequences. Each Separate task was expected to be completed in a stated period, which in each instance was either two or three weeks. Smith requested that Sposato see him by May 13 to discuss the requirements.5/

15. By memorandum dated May 14, 1981 Commander Dudley, Jr. informed Sposato that he was expected to perform his technical work assignments in keeping with his position as a GS-11 physicist. Dudley also stated that he recognized there would be times when Sposato needed to be away from his work area for representational functions; that when this becomes necessary the union president must first receive permission from Smith, or a designee when the supervisor is absent, before leaving the work area. Prior to leaving his work area for such representational function Sposato was obliged, according to this memo, to inform Smith the nature of the business and the time expected to complete same. Further, Sposato was expected to report to Smith upon returning to work after attending to union duties.

5/ The record is unclear as to the details of a meeting held on May 13 between management officials and Sposato. The Union president testified that the purpose was to advise the Union president he would be expected to limit his union functions to 50 percent of his time. In view of the May 12 memo, hereinabove mentioned, and the testimony as adduced, I am persuaded that management informed Sposato on that date that (a) he would have to perform the duties of his position; (b) if he left the work area, he must get permission from his supervisor.

16. In a letter dated May 19, 1981 Sposato wrote Dudley that he objected to the requirement that he be required to obtain his supervisor's permission before leaving the work area. Further, Sposato stated he has not been required to do so for three years, and the contract (Article XI) does not specifically refer to the union president.

17. Record facts reflect that thereafter, and between May 18, 1981 and November 14, 1981 Sposato spent 48 percent of his time on union matters at the Center, 34 percent of his time was devoted to work projects as a physicist, and 18 percent of his time was allocated to "other" (leave, holidays, etc.).

18. Sposato's testimony reflects he has not been denied official time to do union business since May 1981, although he is obliged to get approval from his supervisor before leaving the work area. Under the new procedure the union official must submit list of acts he intends to perform and request permission to leave and attend to same. He has also been assigned job duties which necessarily precludes his spending all official time on Union representational duties.

Conclusions

The central issue herein is simply stated: whether a practice existed at the Center whereby union president Sposato was permitted to spend 100 percent of his official time on representational duties, which was unilaterally changed by Respondent in violation of Sections 7116(a)(1) and (5) of the Act.

In denying the commission of any unfair labor practice, the Respondent asserts it has not denied representational time to the union president. It is argued that Sposato may still continue to have such time, but that he must report to his supervisor as required under the contract. Further, the employer insists that, under Section 7131(d) of the Statute, the amount of official time granted for representational functions must be reasonable, necessary, and in the public interest; that it is not reasonable for an employee to determine whether he shall work or not.

It has been determined that conditions of employment may be established by practice as well as by another form of tacit or informal agreement. Further, those may not be changed by either party in the absence of agreement or impasse following good faith bargaining. See U.S. Department of the Treasury, Internal Revenue Service, New Orleans District, 8 A/SLMR 497, A/SLMR No. 1043. Whether a practice has ripened into an employment condition depends on several factors. Thus, it must be exercised for an extended period of time, and the practice must have continued to exist with the knowledge and consent of management Department of the Navy, Naval Underwater Systems Center, Newport Naval Base, 3 FLRA No. 64.

In the case at bar the record reveals that between January 1, 1980 and May 16, 1981 Union President Sposato spent 100 percent of his official time, while at the Center, on union activities. He had been furnished a private office to attend to his representational functions, and it was customary for Sposato to report thereat as well as leave the office to handle union business without reporting to his supervisor. On the basis of the record herein I am persuaded that management was well aware of the fact that during the aforesaid period Sposato was directing all his official time to union business. While Yannuzzi, who took over as director, may not have been conversant with this practice from its inception, it was known by Smith, the direct supervisor of Sposato. It is clear from the record that the Union president did not report to his supervisor, and that he carried on his representational duties each day with no interference by Smith. Further, the hourly charges kept by Respondent of the time worked by Sposato show that, during the period January 1, 1980 and May 16, 1981, this union official spent all his time (except for leave and holidays) attending to union activities. It may be argued that this period of time devoted exclusively to representational functions was not sufficiently extensive to warrant the conclusion that it constituted a practice. Note is taken, however, that in the Department of the Navy case, supra, the practice continued for 17 months - the exact amount of time as occurred herein - and the Authority concluded the condition prevailed for an extended time. Accordingly, I am constrained to conclude the practice of allowing Sposato to attend to Union duties 100 percent of his time at the Center, between January 1, 1980 and May 16, 1981, was an established condition of employment for this official.

It is argued that Respondent did not restrict Sposato after May 16, 1981 in respect to performing his union functions; that the official was just required to obtain permission from his supervisor to leave the work area. The record belies this contention. After deliberating upon the amount of time which would be acceptable for union functions, management originally decided on April 10, 1981 that 50 percent would be spent on work assignments. Upon being advised by the labor relations officer that a unilateral determination in this regard would be an unfair labor practice, Supervisor Smith informed Sposato that, instead of attaching a specific percentage of time for project work, Smith would assign tasks to the union president with a designated period of expected completion. Further, Carroll admitted, and testified, that after May 1981, the situation changed. Moreover, Commander Dudley's memo of May 14, 1981 to Sposato recited that the latter would be expected to perform his technical work assignments in keeping with his position as a physicist. It is quite apparent, based on the meetings between management officials in April and May 1981, as well as the discussions with Sposato, that Respondent was intent upon altering the past practice whereby the union president spent all of his official time on union business. I am persuaded that in May 1981, management did restrict the amount of time Sposato would spend on such activities; that it accomplished this end by assigning work related tasks to him, which it had not done for the prior

17 months; and that this action constituted a change in the past practice of permitting Sposato to devote 100 percent of his working time on representational functions.

The facts in the Department of the Navy, Naval Underwater Systems, Newport Naval Base, supra, are strikingly similar to those under consideration herein. In the cited case the union president spent all his working hours between May 22, 1976 and September 24, 1977 on union business. On August 23, 1977 the activity wrote the union official that, effective September 6, 1977, he must restrict his union functions to one hour per day. It was held that management had established by practice a term and condition of employment, to wit; allowing the union president to spend all his time on representational duties; that by restricting the amount of official time available to be utilized by the union president without notifying him and bargaining in good faith with the union was violative of Sections 19(a)(1) and (6) of the Order. The foregoing rationale is applicable to the case at bar and determinative of the issue raised herein unless a sufficient basis exists for concluding otherwise.

At the hearing Respondent's counsel lays stress upon Section 7131(d) of the statute in support of the restriction imposed upon Sposato's time devoted to representational functions. It is argued that the foregoing section merely mandates that a union representative be granted a reasonable amount of official time to perform such duties. The employer contends that no employee can determine whether he will work or not; that such determination would flout the Statute. Such an argument is not persuasive. Section 7131(d) specifically declares that the representative be granted official time in any amount the agency and the union agree to be reasonable and necessary. This language contemplates a "bargaining" re such matter, and no inference is warranted that, under this section, management may decide what constitutes a reasonable time and unilaterally change a past practice re the granting of official time for representational duties. Moreover, to the extent that Respondent insists that it would be either illegal or run counter to Government-wide regulations to compensate Sposato for work not performed, this defense cannot prevail here. Such a contention was rejected by the Authority in Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 5 FLRA No. 48. While it agreed that granting of leave without pay must be consonant with law and regulations, the Authority concluded such an assertion of illegality is not a defense to the allegation that management unilaterally eliminated an established practice re granting said leave.

It thus appears clear that management may not arrogate unto itself, as it did here, a determination to discontinue an established practice which has become a condition of employment. A duty is imposed upon an employer to negotiate the change in such practice with the bargaining representative after due notification. It is apparent, and I conclude, that Respondent herein unilaterally changed the amount of official time Sposato could devote to representational duties by no longer permitting him to spend 100 percent of such time thereat; that by its unilateral action in altering the past practice in this regard Respondent violated Sections 7116(a)(1) and (5) of the Statute.[6]

The charging party requests a status quo ante remedy as proper under the circumstances herein. I agree. Although the action by Respondent is directed only to the Union president, it impacts upon all unit employees. As indicated in the record, employees are no longer able to contact the Union official at will, and his absence from the office which was provided him requires employees to make other arrangements to discuss grievances. Moreover, reverting to the former practice will not seemingly unduly disrupt or impair the efficiency of the agency's operations. There is no evidence in the record which is supportive of a disruption of such operations if Sposato continues, at least until the employer fulfills its bargaining obligations, to spend all of his official time on union business. No such disruption appears to have occurred between January 1980 and May 1981. The accessibility of the Union president has been altered by the unilateral change, and a prospective bargaining order would not, in my opinion, fully remedy the violation herein.[7] Cf. Federal Correctional Institution, 8 FLRA No. 111.

Having found that Respondent violated Sections 7116(a)(1) and (5) of the Statute by effecting the unilateral change of a past practice, as aforesaid, I recommend the Authority issue the following:

ORDER

Pursuant to Section 7118 of the Statute and Section 2423.29 of the Rules and Regulations, it is hereby ordered that the Department of the Navy, Naval Air Development Center, shall:

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[6] Record facts reflect that Respondent, in May 1981, required Sposato to check with his supervisor before leaving his work area and upon his return thereto. Apart from the fact that the contract so provided, the complaint herein does not allege such requirement to be a unilateral change of a past practice. Accordingly, no violation is found in that regard.

[7] Charging party requests that Respondent be ordered to pay $2,000.00 to the Union as compensatory damages for the losses employees suffered by reason of Sposato's unavailability. It contends this relief is appropriate under 5 U.S.C. Section 5596(b). The latter provides for reimbursement of pay, allowances, or differentials to an employee who suffered unwarranted or unjustified personnel action. I am satisfied that this statutory provision has no applicability to the case at bar. Moreover, no such relief is appropriate under the Federal Service Labor-Management Relations Statute. The request therefor is denied.

1. Cease and desist from:

    (a) Instituting any changes with respect to the past practice of granting to the president of the American Federation of Government Employees, Local 1928, AFL-CIO, the use of unlimited official time for the performance of his representational duties or functions, without first notifying and, upon request, bargaining in good faith with the American Federation of Government Employees, Local 1928, AFL-CIO, the exclusive bargaining agent of its employees.

    (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

    (a) Rescind the change in the past practice of granting to the president of the American Federation of Government Employees, Local 1928, AFL-CIO, the use of unlimited official time for the performance of his representational duties or functions.

    (b) Notify the American Federation of Government Employees, Local 1928, AFL-CIO, the exclusive representative of its employees, of any intention to change its past practice of granting to the president of the American Federation of Government Employees, Local 1928, AFL-CIO, the use of unlimited official time for the performance of his representational duties or functions, and, upon request, negotiate in good faith, to the extent consonant with law and regulations, on such intended change.

    (c) Post at its facilities at the Naval Air Development Center, Warminster, Pennsylvania, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, Naval Air Development Center and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(d) Notify the Federal Labor Relations Authority in writing, within 30 days from the date of this Order, as to what steps have been taken to comply therewith.

William Naimark

WILLIAM NAIMARK
Administrative Law Judge

Dated: June 2, 1982
Washington, D.C.

[2-CA-951]

APPENDIX

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute any change with respect to the past practice of granting the president of the American Federation of Government Employees, Local 1928, AFL-CIO, the use of unlimited official time for the performance of his representational duties or functions, without first notifying and, upon request, bargaining in good faith with the American Federation of Government Employees, Local 1928, AFL-CIO, the exclusive bargaining agent.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL rescind the change in the past practice of granting to the president of the American Federation of Government Employees, Local 1928, AFL-CIO the use of unlimited official time for the performance of his representational duties or functions.

WE WILL notify the American Federation of Government Employees, Local 1928, AFL-CIO, the exclusive representative of our employees, of any intention to change the past practice of granting to the president of the American Federation of Government Employees, Local 1928, AFL-CIO, the use of unlimited official time for the performance of his representational duties or functions, and, upon request, negotiate in good faith, to the extent consonant with law and regulation, on such intended change.

____
(Agency or Activity)

Dated: ______________________ By: ________________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning the Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, Region II, whose address is 26 Federal Plaza, Room 241, New York, New York, 10278 and telephone number is (212) 264-4934.

[3-CA-1269]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION

(Respondent)

and

Case No. 3-CA-1269

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on June 10, 1982, finding that the Respondent had not engaged in any unfair labor practice as alleged in the complaint, and recommending that the complaint be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (5 CFR 2423.29 (1982)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusion, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., August 30, 1982

James J. Shepard

James J. Shepard, Executive Director

[3-CA-1269]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

SOCIAL SECURITY ADMINISTRATION

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

Case No. 3-CA-1269

Irving L. Becker, Esq. and
Kathleen A. Rohaly on the brief.
For the Respondent

John Harris
For the Charging Party

Erick J. Genser, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §7101, _et seq_.

Upon an unfair labor charge filed by the American Federation of Government Employees, AFL-CIO (herein referred to as the Union or AFGE), on June 23, 1980 against the Social Security Administration (herein referred to as Respondent or SSA), the General Counsel of the Authority, by the Regional Director for Region 3, issued a Complaint and an Amended

Complaint and Notice of Hearing alleging that since on or about June 10, 1980 Respondent has denied to the Union previously granted allotments of official time used for representational purposes. Essentially, Counsel for the General Counsel contends that by agreement between Respondent and the Union and the parties' practice, Union representatives were unilaterally permitted to delegate to others official time allocated for use on representational matters. Respondent admits refusing requests for the transfer of official time but denies that transfer was permissible at the Union's discretion either by agreement or practice.

A hearing on the Complaint was held on December 17, 1981 in Baltimore, Maryland at which time all parties were represented and afforded full opportunity to adduce evidence, call, examine, and cross-examine witnesses and argue orally. Counsel for the General Counsel gave oral argument and counsel for Respondent argued orally and filed a brief.

Upon the entire record in this matter, my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following:

Findings of Fact

Background

Since August 30, 1979, Respondent has recognized the Union as the exclusive collective bargaining representative of a nationwide unit of non-professional employees of Respondent. Prior thereto the Union possessed national consultation rights with Respondent in that AFGE represented Respondent's employees in over 100 separate bargaining units at various locations.[1]

In January 1979 John Harris, the Union's Coordinator for AFGE National Council which represented AFGE in the exercise of its national consultation rights with Respondent, met with F. D. DeGeorge, Acting Deputy Commissioner of SSA, and requested that specific allotments of official time be granted to Council representatives for the conduct of labor-management activities related to national consultation rights. Harris informed DeGeorge the existing practice of Respondent's considering requests for official time on a case-by-case basis was inadequate and suggested that he and Jack Sink, the Council's Secretary-Treasurer, be granted up to three days a week of official time and Regional officers be granted up to one day a week of official time for national consultation rights purposes. DeGeorge asked that the request be made in writing specifying the names of the individuals who would be affected so he could transmit the names to the Regional

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[1] See section 7113 of the Statute.

Commissioner in whose Regions these employees work. Harris complied with this request and by memorandum dated March 1, 1979 DeGeorge approved allocations of official time of up to three days a week official time for Harris and Sink ". . . for National Consultation Rights purposes and local bargaining unit representational functions" and up to one day a week for ten named Regional Council Representatives, one in each of Respondent's ten Regional offices. The latter official time did not include official time already being provided for local bargaining unit representational purposes.[2] The memorandum indicated that appropriate management officials were to meet with their respective Council representatives ". . . to jointly work out mutually agreeable understandings on how and when the official time (was) to be utilized." DeGeorge also noted that the subject of official time would be a matter for bargaining once the then pending national unit consolidation was certified and the allotments set out in the memorandum would serve as an interim arrangement ". . . pending certification of the national unit and the simultaneous termination of the National Consultation Rights relationship."

By letter to Respondent dated August 3, 1979 the Union noted that certification for consolidation was imminent and suggested that the official time policies outlined in the DeGeorge memorandum, above, remain in effect until the parties negotiated a master agreement which would then control the matter. SSA responded on September 18, 1979 and informed the Union that no change in existing arrangements covering official time authorizations was contemplated and Respondent also expected that the matter of official time usage would be included in future negotiations.

On August 30, 1979 the various separate collective bargaining units were consolidated into one national unit. Thereafter, the Union administered the overall unit through a General Committee and its five constituent National Councils and the Headquarters local union, which organizations were coextensive with SSA's operational components. In October 1979 the Union notified SSA of the names of its component representatives, their titles and their areas of authority. In its December 1979 response to the Union, SSA designated its counterpart component representatives and attached thereto was a listing of SSA components, the Union's counterpart organization and the name of the Union officer for that organization, and under the caption "The following redelegations affect Regional Commissioners" was a list of the ten SSA Regional office cities with a Union representative's name adjacent thereto. Immediately after this Regional listing was the following comment:

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[2] Local agreements made provision for official time allocations for local representation matters.

> "These individuals have authority to redelegate within their respective regions. The Boston, New York, and San Francisco Regions should see little change from their past dealings. The other seven regions can expect a committee substructure with representatives from each State in the region. The primary regional union designee may, of course, designate individuals to handle appropriate labor-management functions. Prior to using official time or facilities, these secondary union officials must obtain permission from regional management on a case-by-case basis."

Seven of the ten individuals whose names were listed appeared as "Regional Council Representatives" in the DeGeorge memorandum, supra, apparently serving a similar representational function as under National Consultation rights. Further, although substantial turnover in the Union's Regional Representatives had occurred from the date of the DeGeorge memorandum to the date of hearing, the individual occupying the position was always alloted up to one day a week official time while in that position.

On March 6, 1980 AFGE and SSA executed a memorandum of understanding concerning procedures or "ground rules" for negotiating an agreement covering the national unit. The memorandum of understanding, inter alia, listed seven negotiators for SSA, and four named and three unnamed negotiators for the Union. It also provided that all employee negotiators including one alternate for each negotiators would be on official time. Union proposals were to be submitted by April 7, 1980 and negotiations were to commence within 60 days thereafter.

The Harris Refusal

In early March 1980 Harris, President of the National Council of Social Security Field Office Operations Locals since December 1979 and also a designated member of the Union's negotiating committee, contacted Herbert Creech, Director of Labor Relations for SSA. As a National Council President Harris had been permitted up to 100 percent official time to perform the duties of that office.[3] Harris and Creech agreed that negotiations would be protracted. Harris told Creech he anticipated asking Jack Sink, then Executive President to Harris, to be acting President while Harris was engaged in negotiations and accordingly suggested that Sink should receive Harris' 100 percent official time allocation.[4] Creech said he would refer the matter to the SSA's chief negotiator. In early June Harris called Creech and inquired about the transfer of official time. Creech told Harris the SSA's Director of the Office of Human Resources opposed the transfer. Harris raised the question again on June 10, 1980 at the parties first negotiating session and was told by Respondent's chief negotiator that he would not reverse the decision not to permit Harris to transfer his allotment of official time to Sink as acting President.[5]

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[3] The record does not disclose the origin of the allocation of official time for National Council Presidents.

[4] Sink was then receiving up to three days a week official time to perform the duties of Executive Vice President.

The Daley Refusal

In March 1979 Percy Daley was a Regional Council Representative in SSA's Boston Region and accordingly was allowed up to one day a week official time for national consultation rights purposes per the DeGeorge memorandum, supra. After consolidation of the bargaining units occurred Daley continued to receive this allotment as Regional Vice President of the National Council of SSA Field Operations Locals for the Boston, Massachusetts Region.

Daley was designated by the Union to participate in national negotiations commencing in June 1980. Around June 2 Daley talked to a management representative and informed him that he was going to Baltimore, Maryland for negotiations and designated a Mrs. Walker to perform his National Council duties during his absence. Daley expressed a desire that Mrs. Walker be allocated the one day (eight hours) a week official time he had been receiving to perform those responsibilities. The management representative indicated he didn't foresee any problem and on July 2 Daley, according to his testimony, confirmed his "request" in a letter to the Assistant Regional Commissioner for the Boston Region's Field Operations. By letter dated June 11, 1980 the Assistant Regional Commissioner denied Daley's request indicating that he was informed by "Central Office" that Mrs. Walker could not be granted official time allocated to Daley since the right was granted to Daley as an individual and was not transferrable. Thereafter Daley served on the Union's bargaining team and no transfer of his official time granted to be used for National Council duties was permitted by management.

The Alleged Practice

Evidence adduced by counsel for the General Counsel to support the contention that a practice of permitting Union representatives to transfer allocated official time to others established that three

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[5] While the testimony on transfer of official time in this case frequently referred to "redelegating" and "designating" another individual to fill a particular Union position, the case was tried on the theory, and I find, that only the transfer of official time was at issue and Respondent was not concerned with the Union's designation of its officers as such.

Regional Vice Presidents of the National Council for Field Office Operations Locals and the Executive Vice President of the National Council for Field Office Operations Locals redelegated allocated official time on various occasions to others to perform the duties of their offices. Thus, Demetria Wills, Regional Vice President for the Kansas City Region, had been allocated up to eight hours a week official time for representational duties per the DeGeorge memorandum of March 1, 1979, supra, and the September 19, 1979 extension of that arrangement, supra. By letter dated May 22, 1980 Ms. Wills designated another Regional employee, Diane Abell, to act as Regional Vice President for the period June 2, 1980 through August 1, 1980 while Ms. Wills was involved in an agency training session.[6] In a memorandum dated June 3, 1980 from the Acting Regional Commissioner for the Kansas City Region to the agency's Area Director, the Acting Regional Commissioner acknowledged the designation of Ms. Abell as Acting Regional Vice President and indicated that Ms. Abell would be accorded the same privileges, including official time, that were granted to Ms. Wills.

Another Regional Vice President, Kara Lynn Rankin, who was allocated up to eight hours a week official time for representational duties, delegated her duties as Regional Vice President to another employee, Jeff Saul, for the periods July 2 to July 20, 1979 and June 9 to June 20, 1980 while she was on leave. The Seattle Regional Commissioner was so notified and he in turn notified appropriate management officials that Ms. Rankin's official time would be redelegated to Mr. Saul.[7]

The evidence also reveals that Karen Downey Jennings, another Regional Vice President with similar rights and duties as Ms. Wills and Ms. Rankin, delegated her official time to another employee to act for her in her representational capacity on "two or three" unspecified occasions for unspecified durations for unspecified purposes when she was Regional Vice President in the Philadelphia Region from January 1979 through August 1980. Ms. Jenning and her Regional Commissioner had "determined" that when Jennings was absent from her office she would notify the Regional Commissioner by memorandum, with copies to her replacement's District Manager, who the replacement would be and the replacement would then be "permitted" to use the official time allocated to Ms. Jennings.

6/ Ms. Abell although located in the Kansas City Region worked in a different city than Ms. Wills.

7/ Although Rankin and Saul were located in the Seattle Region, they worked in different cities within that Region. The 1980 delegation was accomplished by Rankin notifying Regional management of the delegation by memorandum of May 28, 1980 and management informing Rankin by letter of June 2, 1980 that appropriate management officials had been notified of the redelegation.

The evidence further discloses that in late February or early March 1980 Ms. Jennings acted for a 2-week period on behalf of Jack Sink, then Executive Vice President of the National Council of Field Operations Locals. As Executive Vice President Sink was allocated up to three days a week official time for use on representational affairs. The transfer of official time occurred after Sink telephoned SSA's Director of Labor Relations Herbert Creech and "asked" if he could delegate his allocated time to Jennings for a 2-week period. Creech replied something to the effect that he would see what he could do. Shortly thereafter Jennings' District Manager or Assistant District Manager notified her that the requested transfer of official time had been approved.

Discussion and Conclusions

Prior to the commencement of this hearing witnesses Wills, Rankin, Saul, and Jennings were subpened to appear and testify at these proceedings by counsel for the General Counsel. A Petition to Revoke Subpenas was filed by counsel for Respondent with the Regional Director. Counsel for the General Counsel filed an opposition to Respondent's petition and the Regional Director referred the matter to the presiding Administrative Law Judge for resolution. At the hearing I reserved ruling on the matter.

In its petition, at the hearing and in its brief, counsel for Respondent takes the position that the subpened employee witnesses' testimony was immaterial to a resolution of the issues herein and counsel for General Counsel's subpening these witnesses was a frivolous gesture which, if not revoked, would place an unjust burden on Respondent since travel, per diem and official time must be provided by Respondent.

Counsel for the General Counsel contends that the testimony of the subpened witnesses bears substantial relevance to the allegations contained in the Complaint and, in any event, under section 2429.7(e) of the Authority's Rules and Regulations Respondent lacks standing to petition to revoke the subpenas.

Section 2429.7(e) of the Rules and Regulations provides in relevant part that "Any person served with a subpena who does not intend to comply, shall, within five (5) days after the date of service of the subpena upon such person, petition in writing to revoke the subpena." Counsel for the General Counsel reasons that since the subpened employees were neither managers nor supervisors, counsel for Respondent does not represent "any person served with a subpena" and therefore has no standing to petition to revoke the subpenas. Thus, counsel for the General Counsel contends that although Respondent would be obligated to release its employees for hearing purposes and pay for whatever time was spent in connection with the hearing including per diem and travel expenses, it should not be heard to contest whether such testimony is necessary to resolve the issues in question and whether such subpening of witness might be an abuse of very process itself.[8]

Respondent contends that based upon its financial obligations regarding the production of an employee witness, it has sufficient interest to establish "standing" to challenge the subpena and "service" on management occurs when an employee is subpened since the practice is for the employee to show the subpena to a supervisor in order to be released for attendance at a proceeding.

I conclude that Respondent herein has standing to petition to revoke the subpenas served upon employee witnesses. While section 2429.7(e) of the Regulations might be read to imply that only the person served with a subpena has the right to petition to revoke, I do not construe the language of the Regulations to compel that conclusion. Section 2429.7(e) does not specifically state that only any person served may file a petition to revoke. In addition, section 2429.7(b) of the Regulations provides, "Where the parties are in agreement that the appearance of witnesses . . . is necessary, and such witnesses agree to appear, no such subpena need be sought." Thus, Respondent, as a party to these proceedings as defined in section 2421.11 of the Regulations, would be authorized to agree to the appearance of an employee witness therefore obviating the necessity of a subpena but, if the General Counsel's position was upheld, not have standing to object to the appearance of the witness. It appears to me that in order to avoid such an incongruous result the Regulations must be interpreted to provide a vehicle for Respondent to disagree with regard to the necessity of an employee witnesses appearance thereby inferentially providing Respondent with "standing" to express that disagreement. It has been long held that statutes are to be considered in their entirety and read to avoid unreasonable or absurd results if possible.[9] No less is required when construing regulations. Indeed, cases decided under the Federal Labor-Management Relations Statute have held that the Regulations must be read in a context of reasonableness and fundamental fairness respecting the rights of the parties to these proceedings.[10]

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[8] Counsel for General Counsel acknowledges, however, that the General Counsel has a "good faith" obligation in subpening witnesses.

[9] Alexander v. Cosden Pipe Line Co., 290 U.S. 484, 545, S. Ct. 292 (1934); Helvering v. Hammel, 311 U.S. 504, 61 S. Ct. 368 (1941).

[10] Cf. Norfolk Naval Shipyard, Portsmouth, Virginia, 5 FLRA No. 105 (1981); Department of Health and Human Services, Social Security Administration, Great Lakes Program Service Center, Case No. 5-CA-707, OALJ-81-090 (1981); and Department of the Treasury, Internal Revenue Service, Jacksonville District, Case No. 4-CA-823, OALJ-82-72 (1982).

Further, through its essential role, close relationship, and financial interest in releasing a witness from employment committments to appear to testify, Respondent is intrinsically enmeshed in the subpena service process. Respondent is a party to these proceedings, the employer of the witnesses, responsible for making the witnesses available for attendance at the hearing, and responsible to grant the employees official time including travel time, and paying transportation and per diem expenses.[11] In these circumstances I conclude, as urged by Respondent, that SSA is identifiable with a "person served with a subpena" within the meaning of section 2429.7(e) of the Regulations.

Accordingly, in view of the entire foregoing I conclude Respondent has "standing" to file a petition to revoke the subpenas for attendance at the hearing of its employees.

I further conclude, as should be obvious from my findings herein which are based in large measure on the testimony of the subpened witnesses, that their testimony was reasonably related to the matters at issue and indeed was necessary for a proper presentation of counsel for the General Counsel's case.

Turning now to the substantive issues herein, from my evaluation of the evidence I do not conclude that any agreements between the parties support the contention that Union representatives were permitted to unilaterally transfer official time to others. The DeGeorge memorandum when referring to Harris and Sink approves official time "for the following AFGE representatives", and when referring to the other named individuals approves official time "for the following Regional Council Representatives." Thus, while the allocations go to named positions, the positions are specifically associated with named individuals. Moreover, while Regional management and Council representatives could "jointly work out mutually agreeable understandings" on official time usage, no specific mention is made of transfer of alloted time in any manner. Accordingly, I find the document inconclusive in evaluating the transferability of official time.

The only other document bearing on the issue is the attachment to Respondent's December 31, 1979 letter to the Union setting forth AFGE's delegations of authority. The relevant portion of that document, while indicating that the named Regional Union representatives "had authority to redelegate within their respective regions", further provided that before official time could be used by the designee the individual "must obtain permission from regional management on a case-by-case basis." Thus it appears that official time was not recognized to automatically follow a transfer of representational status but rather, management reserved the right to grant or decline permission for official time use depending upon the circumstances of the situation. Accordingly, I conclude Counsel for the General Counsel has failed to support his contention that Union representatives were permitted by agreement to unilaterally transfer official time to other representatives.[12/]

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[11] See section 2429.13 of the Regulations.

With regard to the existence of a practice of Respondent permitting Union representatives to unilaterally transfer allocated official time I similarly conclude the evidence fails to support this contention.[13/] It is well established that while parties may establish terms and conditions of employment by practice, in order to establish a practice the practice must be consistently exercised for an extended period of time with the agency's knowledge and consent. Internal Revenue Service and Brookhaven Service Center, 6 FLRA 713 (1981); Department of Defense, Department of the Navy, Polaris Missile Facility Atlantic, Charleston, South Carolina, 6 FLRA 372 (1981); and Department of the Navy, Naval Underwater Systems Center, Newport Naval Base, 3 FLRA 413 (1980).

How the terms "consistently exercised" and "for a extended period of time" are to he construed will, of course, depend upon the attendant facts and circumstances of the particular situation. In Internal Revenue Service, Brookhaven, supra, a practice of permitting multiple union representatives to be present during discussions with management representatives on labor relations matters was established based upon numerous meetings occurring over a 3-year period. In that case Administrative Law Judge Garvin Lee Oliver, whose findings and conclusions were adopted by the Authority, concluded that the parties' meetings "were of such sufficient numbers and over such a long duration that a reasonable person would have recognized this practice and would have expected it to continue in the future.[14/] In Department of the Navy, Underwater Systems Center, supra, the Authority found that the utilization by the union's president of up to 40 hours a week official time for representational

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12/ Respondent urges that by executing the memorandum of understanding on "ground rules" for negotiations on March 6, 1980, which provided for official time to be used during negotiations, the Union somehow "waived" its right to have Harris' and Daley's previously alloted official time transferred to others while they were negotiating the national agreement. The law on waivers under the Statute is abundantly clear and the facts of this case in no way establish the existence of a waiver as contended by Respondent.

13/ Respondent contends that to establish a practice only incidents which occurred previous to or in close temporal proximity with the matter at issue may be considered. Thus, Respondent would change the meaning of "practice" to "past practice". While the term "past practice" is frequently used in reference to a "practice" I find such use is simply a misnomer and reject Respondent's contention.

14/ Internal Revenue Service, Brookhaven, at 726.

purposes had been consistently exercised for an extended period based upon the president spending approximately 73 percent of his time on representational matters over a 16-month period.

The evidence of a practice in the case herein spans a period between early 1979 and August 1980. During this period four individuals were allowed to transfer official time and two, Harris and Daley, were not. Ms. Wills' transfer of official time for training purposes and Ms. Lynn's transfer in June 1980 occurred virtually at the same time Harris and Daley were being refused authority to transfer time. Ms. Jennings testified that her arrangement with her Regional Commissioner was that upon notification, the Regional Commissioner "permitted" the transfer of time. While the circumstances of obtaining the transfers might suggest that the transfer of official time was automatically granted upon notification to management of a desire to transfer the time, the use of the word "permitted" can also connote that the parties perceived something other than unilateral control over the redelegation of official time by the person originally allocated the time.[15] The latter interpretation is consistent with the language in Respondent's December 1979 communication to the Union, supra, wherein it stated that Regional representatives could redelegate within their respective regions but that prior to using official time the representative to whom the official time was delegated ". . . must obtain permission from regional management on a case-by-case basis." Certainly if permission must be obtained before official time could be transferred one must assume that management retained the right to withhold permission and thereby deny the transfer of official time.

While the above December 1979 letter is silent with regard to National Council officers, the evidence reveals that National Council Executive Vice President Sink, when talking to Labor Relations Director Creech in late February or early March 1980, "asked" if he could delegate his official time to another. Although such transfer of time was subsequently approved, the fact that Sink felt compelled to request permission to transfer the time lends support and indeed strongly suggests that Council Vice President Sink was not of the opinion that the Union had unilateral control over the transfer of official time by agreement or practice.

In sum, the evidence herein reveals that during approximately 18 months four individuals transferred official time on a total of seven occasions and two individuals were refused transfers. A substantial number of the transfers which took place occurred under circumstances which could be construed to have been obtained only after "permission" was granted by management on a "case-by-case basis." Accordingly, in

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15/ I also note that Daley used the term "request" when seeking to have his official time transferred to another employee.

view of the entire foregoing and under all the circumstances herein I conclude that the General Counsel has not established by a preponderance of the evidence that a practice consistently exercised for an extended period of time has existed relative to the transfer of official time by Union representatives as alleged. Therefore, it is recommended that the Federal Labor Relations Authority issue the following Order pursuant to 5 C.F.R. 2423.29(c):

ORDER

IT IS HEREBY ORDERED that the Complaint in Case No. 3-CA-1269 be, and hereby is, dismissed.

Salvatore J Arrigo

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: June 10, 1982
Washington, D.C.

[4-CA-826]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF DEFENSE
DEPARTMENT OF THE NAVY
NAVAL AIR STATION

(Respondent)

and

Case No. 4-CA-826

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1960, AFL-CIO

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on June 30, 1982, finding that the Respondent had not engaged in any unfair labor practice as alleged in the complaint, and recommending that the complaint be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (5 CFR 2423.29 (1982)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusion, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., August 30, 1982

James J. Shepard

James J. Shepard, Executive Director

[4-CA-826]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF DEFENSE
DEPARTMENT OF THE NAVY
NAVAL AIR STATION

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1960, AFL-CIO

Charging Party

Case No. 4-CA-826

Dennis K. Reischl
Walley Bond
For the Respondent

Harold E. Stout
For the Charging Party

Barbara S. Liggett, Esq.
For the General Counsel

Before: FRANCIS E. DOWD
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, herein referred to as the Statute, 92 Stat. 1191, 5 U.S.C. §7101, et seq. It was instituted by the Regional Director of the Fourth Region of the Federal Labor Relations Authority by the issuance of a Complaint and Notice of Hearing dated May 29, 1981. The Complaint was issued following the investigation of an unfair labor practice charge filed on March 12, 1981 by American Federation of Government Employees, Local 1960, AFL-CIO, herein referred to as the Union, AFGE, or Charging Party.

The Complaint alleges that agents of Respondent met with unit employee Leroy E. Bryant on January 7, 1981 and conducted an examination within the meaning of Section 7114(a)(2)(B)(1) of the Statute; that Bryant reasonably believed the examination could result in disciplinary action; that Bryant requested representation; and that the examination continued after and notwithstanding Bryant's request. The Respondent's position is that once Bryant made his request for representation, no further questions were asked of Bryant and the examination was promptly terminated. The General Counsel alleges that Respondent continued, expressly or implicitly, to ask Bryant questions after he requested representation. Essentially, this case involves a credibility resolution with respect to what was said at the January 7 meeting.

A hearing was held in Pensacola, Florida at which the parties were represented by counsel and afforded full opportunity to adduce evidence and call, examine, and cross-examine witnesses and argue orally. Briefs filed by Respondent and the General Counsel have been duly considered.

Upon consideration of the entire record in this case, including my evaluation of the testimony and evidence presented at the hearing, and from my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommended order.

Findings of Fact

1. The Union is the exclusive representative of a unit of employees of Respondent. Among the employees represented by the Union are firefighters employed by Respondent, including Leroy Bryant.

2. On January 7, 1981, Grady L. McKissack was Acting Fire Chief. Below him in supervisory rank was Station Chief Walter N. Freyer and below him was Fritz E. Nolan, the fire captain or assistant crash captain. Captain Nolan was employee Bryant's immediate supervisor.

3. Early in the morning of January 7, a copy of a letter from Harold Stout, President of AFGE Local 1960, to the Commanding Officer of Naval Air Station, Pensacola was posted on the bulletin board at the Sherman Crash and Rescue Fire Station, Pensacola. The letter referred to certain unfair labor practice charges and contained statements about alleged contract violations and alleged violations of employees' rights. Bryant admits having seen the letter when he passed by the board enroute to his duty station that morning. Captain Nolan also observed the letter, read it and telephoned McKissack who instructed Nolan to leave the letter on the bulletin board and informed Nolan that he would be right over.1/

1/ I credit Nolan over McKissack who stated that he just happened to be in the area, saw the letter on the board, and brought it to Nolan's attention.

Thirty minutes later McKissack arrived, removed the letter from the board and came into Freyer's office where he read it. He inquired whether Nolan had found out who put the letter on the board and Nolan replied that he had asked a few people but learned nothing. McKissack asked for Bryant, whose office was nearby, to be sent in.[2]

4. McKissack, Nolan and Freyer testified for Respondent with respect to what was said at the January 7 meeting. Bryant testified for the Charging Party and the General Counsel. Excellent briefs filed by Respondent and the General Counsel discussed the testimony in detail and presented cogent arguments as to which version is the most credible and plausible under the circumstances.

a. Based upon my thorough analysis of the testimony as well as my observation of the witnesses and their demeanor, I have concluded that Bryant's version is not credible. According to Bryant, who was not told why he was being summoned to the crash captain's office, the very first question he was asked by McKissack was whether he put the letter on the board. Bryant quickly concluded from the tone of McKissack's voice that he needed to ask for union representation, so he did. McKissack ignored Bryant's request and asked two more questions which Bryant also refused to answer. McKissack then repeated each of questions several more times in a period of 10 to 15 minutes and Bryant kept reiterating that he didn't have to say anything without union representation. Finally, he was told he could return to duty.[3]

b. The more plausible version of what happened are the accounts presented by Nolan and Freyer who witnessed but did not take part in the

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2/ McKissack testified that he suspected Bryant because he had heard that morning that "Bryant was talking with some of the people and had a paper. . . ." Freyer testified that because McKissack asked first to speak to Bryant that he (Freyer) felt that McKissack suspected Bryant (Tr. 68 and 84).

3/ It is possible, but not probable, that McKissack would have commenced the interview by immediately zeroing in on the question of whether Bryant himself was the person who put the letter on the board. It is far more likely that McKissack would lead up to the central question of Bryant's role by first asking some preliminary questions such as whether he had seen the letter in question and whether he knew who placed it on the board. Even more unbelievable, however, is Bryant's claim that for a period of 10 to 15 minutes McKissack repeated over and over a three-question litany to which Bryant steadfastly repeated his refusal to answer without benefit of a representative. The account presented by Respondent's witnesses is a more convincing and believable version of what happened.

conversation. Nolan's testimony, in response to questions by Respondent's counsel, is in pertinent part as follows:

> Q. Okay, go on, please.
>
> A. Okay. Chief McKissack asked Mr. Bryant at that point had he seen the letter on the board that was addressed to the commanding officer. And Mr. Bryant said, "I don't believe I did." He says, "Well, maybe, yeah," he said, "I saw the letter." And he just sort of stumbled around a little bit and he said, "Yeah. I saw the letter." He said, "Do you know who put it up there?" And he said, "No." And he said, "Did you put it up there?" And he said. "No." Then Mr. Bryant said, "If you're going to ask me any more questions," he said, "I'd like to have" -- I think he said legal representation, but it could have been union representation. But he wanted a representative there if they were going to ask him any more questions, he made that clear.
>
> Q. Do you recall exactly how he phrased this?
>
> A. He said, "If you're going to ask me" -- he said, "I don't want to answer any more questions unless I have a representative."
>
> Q. And what, if anything ---
>
> A. (Interposing) I don't recall if he said union or legal but it was one or the other.
>
> Q. What, if anything, did Chief McKissack say following that?
>
> A. Chief McKissack said, "Mr. Bryant, you don't need the union representative because I'm not going to ask you any more questions." And then he went on and made a few statements.
>
> * * *
>
> Q. Did he ask him any more questions? Did he -- let me rephrase it -- did he repeat any of the three questions you told us he had already asked?
>
> A. Oh, no, sir, he never asked him another question.
>
> Q. Did Mr. Bryant give him any more answers then?

> A. Mr. Bryant made no more statements whatsoever and there were no questions asked of him. Mr. Freyer never said one word and neither did I. And after about a minute Mr. Bryant said, "Is that all?" And Chief McKissack said, "Yes, that's all," and he got up and left the room.

c. Nolan's testimony (Tr. 41-44) is corroborated by Freyer (Tr. 68-71, 75-77), both of whom I credit, and is consistent with the testimony of McKissack (Tr. 84). Each insists that Bryant actually responded to a few of McKissack's questions before stating that he didn't want "to answer any more questions" without a representative. Each insists that McKissack asked no more questions and that from that point on Bryant remained silent while McKissack made a statement or comment for a minute or two before the meeting broke up. Thus, the entire meeting did not take 10 or 15 minutes as alleged by Bryant, although perhaps it seemed that long to him. Rather it took, at the most, 3 to 5 minutes as testified by McKissack.

d. Based upon the foregoing, I conclude that once Bryant asked for a representative, no further questions were expressly asked of him. However, an issue remains as to whether the subsequent remarks by McKissack contained any implied questions still seeking to obtain from Bryant the information sought.

5. After Bryant told McKissack that he was not going to answer any more questions without a union representative, and after McKissack replied that he was not going to ask any more questions, an obviously frustrated McKissack became visibly upset and made a brief speech in which he deplored Bryant's lack of cooperation, explained that official letters especially to the C.O. of the Base should not be posted on bulletin boards without permission, and complained of Bryant's past attitude.4/ When McKissack completed his statement, Bryant asked if that was all and was told he could leave. Nolan and Freyer were both examined and cross-examined extensively at the hearing, and credibly testified that McKissack was making a statement, or short speech and did not ask any specific questions. I conclude that McKissack, frustrated in his attempt to find out who put the letter on the bulletin board, was bemoaning aloud his inability to proceed further, which he characterized as a "sad situation." He then got personal and complained aloud about Bryant's attitude toward his job and the organization.5/ Nothing in

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4/ These findings are based upon the credited testimony of Nolan (Tr. 42, 43), Freyer (Tr. 69), and McKissack (Tr. 88).

5/ I credit McKissack's testimony (Tr. 89) in which he relates why he was upset and felt that it was "demoralizing" to see a letter to the C.O. of this type posted on the bulletin board.

McKissack's remarks, however, referred directly or indirectly to any activities by Bryant on behalf of the Union; or criticized him for exercising his right to have a union representative present, or threatened him in any way with retaliation. Moreover, the complaint does not allege that McKissack's remarks constituted independent violations of Section 7116(a)(1). From the foregoing, I find and conclude that McKissack's examination of Bryant terminated when Bryant asked for a representative.

Conclusions of Law

6. The provisions of the Statute and interpretative case law applicable to the instant case are clear. That is, Section 7114(a)(2)(B) of the Statute provides that the exclusive representative is entitled to be present at an examination in connection with an investigation of a unit employee if (1) the employee reasonably believes discipline could result and (2) the employee requests representation.[6]

Failure to comply with this provision is made an unfair labor practice by Sections 7116(a)(1) and (8) of the Statute, which provides that it is an unfair labor practice for an agency "(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; . . . or (8) to otherwise fail or refuse to comply with any provision of this chapter."

7. It is not contested, and I find, that the purpose of the January 7 meeting was to conduct an examination in connection with an investigation. Accordingly, Section 7114(a)(2)(B) is applicable.

8. It is also not seriously contested, and I find, that the objective facts of the January 7 meeting provided a reasonable basis for Bryant to conclude that the examination could result in disciplinary

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[6] Section 7114(a)(2)(B) provides as follows:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at --
>
> > (B) any examination of an employee in the unit by a representative of the agency in connection with investigation if --
> >
> > > (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
> > >
> > > (ii) the employee requests representation.

action.[7] As a result, Bryant made a request for representation and was promptly told by McKissack that no further questions would be asked. The credited testimony reveals that no further questions were asked, either expressly or impliedly. Thus, the examination portion of the meeting was terminated as soon as Bryant requested representation, and the balance of the meeting lasting only another minute or two consisted of Bryant listening in silence to McKissack's few statements deploring the entire incident and commenting upon Bryant's attitude.[8] Accordingly, I find that Respondent did not fail to comply with the requirements of Section 7114(a)(2)(B) and therefore did not violate Sections 7116(a)(1) and (8).

Having found that Respondent did not violate Sections 7116(a)(1) and (8) of the Statute as alleged in the complaint, it is recommended that the Authority issue the following:

ORDER

That the Complaint in Case No. 4-CA-826 be, and hereby is, dismissed.

Francis E Dowd
FRANCIS E. DOWD
Administrative Law Judge

Dated: June 30, 1982
Washington, D.C.

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[7] Whether an employee "reasonably believes" that disciplinary action may result from the interview is to be determined by the external evidence alone, and not by the employee's state of mind; i.e. whether the employee actually fears he may be subject to discipline. Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Hartford District Office, 4 FLRA No. 37 (1980), enforced U.S.C.A. D.C., No. 80-2423, February 19, 1982.

[8] Because I have found that no questions were asked of Bryant after he asked for representation, Lackland Air Force Base Exchange, 5 FLRA No. 60 is distinguishable. There, a single question was asked and it was deemed sufficient to warrant a finding that the examination was being carried on subsequent to the employee's request for representation. But there was no dispute that the question was asked (and answered) and it clearly had the effecting of renewing the examination after a brief hiatus.

[5-CA-1129;5-CA-1131]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
SCOTT AIR FORCE BASE, ILLINOIS

(Respondent)

and

Case Nos. 5-CA-1129
5-CA-1131

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R7-23

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the alleged unfair labor practices and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (5 CFR 2423.29(1982)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusion, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., August 27, 1982

James J. Shepard

James J. Shepard, Executive Director

[5-CA-1129; 5-CA-1131]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF THE AIR FORCE
SCOTT AIR FORCE BASE, ILLINOIS

Respondent

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R7-23

Charging Party

Case Nos. 5-CA-1129
5-CA-1131

Gordon B. Finley, Esq.
For the Respondent

Mark B. Clevenger, Esq.
For the Charging Party

Sandra LeBold, Esq.
For the General Counsel

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

This decision concerns a consolidated unfair labor practice complaint issued by the Regional Director, Region Five, Federal Labor Relations Authority, Chicago, Illinois against the Department of the Air Force, Scott Air Force Base, Illinois (Respondent). The consolidated complaint[1/] alleged, in substance, that Respondent violated sections

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[1/] Case No. 1056, involving essentially paragraphs V and VI of the complaint, was severed and withdrawn by the Regional Director.

7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §7101 et seq. (the Statute), by issuing an official reprimand to an employee, Geraldine Waldrop, because of statements the employee made during the course of a grievance meeting. The complaint also alleged that Respondent violated section 7116(a)(1) of the Statute by holding a formal discussion with an employee and unilaterally assigning a Union steward other than the duly designated Union representative to represent the employee. Respondent denied the alleged violations.

A hearing was held in this matter at Scott Air Force Base, Illinois. The Respondent, Charging Party, and the General Counsel were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witness, and file post-hearing briefs. Based on the entire record herein, including my observation of the witnesses and their demeanor, the exhibits, other relevant evidence adduced at the hearing, and the briefs, I make the following findings of fact, conclusions of law, and recommendations.

I. Case No. 1131

A. Findings

At all times material herein, the National Association of Government Employees, Local R7-23 (Charging Party or Union) has been recognized as the exclusive representative of an appropriate unit of Respondent's employees.

On March 31, 1981 Respondent placed an entry in the AF-971 file of Geraldine Waldrop, an employee in Respondent's Systems Management Branch, Base Contracting Division. The entry grew out of a telephone call which Mrs. Waldrop had made to Fort Lee, Virginia concerning a correspondence course she was taking. During the course of the telephone call, Mrs. Waldrop made various complaints about Respondent. The AF-971 entry stated, in part, that Mrs. Waldrop had wasted another government employee's time with her telephone call, and, in the future, she should take her complaints through the proper chain of command. (Joint Ex. 3).

Mrs. Waldrop initiated a grievance concerning the entry in her AF-971 file. After being advised by her immediate supervisor, Lt. Hildred E. Pepper, Jr., that he could not remove the entry, Mrs. Waldrop, by Union president Carl L. Denton, filed a formal grievance with Major Wayne Furry, her third level supervisor.

Major Furry made arrangements for a meeting in his office on the grievance. On April 23, 1981, Major Furry, Lt. Pepper, Ray Witham of the civilian personnel office, Mrs. Waldrop, and her representative, Carl Denton, attended the meeting. Major Furry read the second step grievance aloud and asked Mr. Denton and Mrs. Waldrop if they had anything to add. Mr. Denton made some general comments, and Mrs. Waldrop gave her side of the story. Mrs. Waldrop began to digress from the telephone call incident to general problems she had experienced during her employment at Scott Air Force Base. She alleged that she had been harassed ever since she had been at Scott. She began to relate problems she had in working previously in the commissary and other employment problems she had in May 1980. Major Furry twice interrupted her to ask that she stick to the subject of the grievance involving the telephone call and not to digress. Mr. Denton and Mrs. Waldrop did not agree and stated that Mrs. Waldrop was entitled to give the complete background.[2/] As considerable friction was developing, Major Furry called a recess for five to ten minutes.

After the meeting resumed, Major Furry told Mrs. Waldrop that she should stick to the subject of the grievance, that he would not allow her to stray, and asked if she had any additional facts concerning the grievance. Mr. Denton reiterated that Mrs. Waldrop should be allowed to tell her whole story. When Mrs. Waldrop again went into other matters, Major Furry cut her off. At one point, he went to the door and remarked in a loud and aggravated voice, "Are you going to stick to the subject or is this meeting over?" Major Furry went back to his desk, but each time Mrs. Waldrop tried to speak on matters unrelated to the specific grievance, Major Furry cut her off and insisted that she stick to the subject. Mrs. Waldrop contended that she was sticking to the subject. When Mrs. Waldrop started telling about her first day in the correspondence course, Major Furry asked if she had any facts pertaining to the telephone call. At this point, Mrs. Waldrop yelled at Major Furry, "You are a Hitler." She yelled this statement about four times. The loud statements could be, and were, heard by Major Furry's secretary and a cleaning lady who were outside the closed door to Major Furry's office. The cleaning lady left the area and the secretary closed the door to the outer office. The meeting continued for a few minutes more with Mrs. Waldrop wanting to go into background information and Major Furry cutting her off. Major Furry stated he would provide a written response to the grievance. The meeting lasted a total of about 30 minutes.

On April 30, 1981 Lt. Hildred E. Pepper, Jr. issued Mrs. Waldrop a written notice of reprimand. The letter stated, in part, as follows:

> 1. You are hereby reprimanded for making a false, malicious, unfounded and highly irresponsible statement about Major Wayne L. Furry, Chief of Base

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[2/] Mrs. Waldrop was not called as a witness. Mr. Denton testified that Mrs. Waldrop wanted to go into background concerning the grievance; however, he was unable to recall any specific discussion concerning the grievance during which Major Furry cut Mrs. Waldrop off. I credit the testimony of management witnesses to the effect that Mrs. Waldrop was endeavoring to discuss background information concerning her employment problems generally which were unrelated to the specific grievance.

> Contracting Division. This action is based on the following incident:
>
> On 23 April 1981 with the following personnel in attendance: Major Furry, Lt. Pepper, Mr. Witham, Mr. Denton, and yourself, you were consistently requested to keep on the subject at hand--Employee Initiated Grievance. In front of all personnel present, you yelled at least four times to Major Furry, "You are a Hitler." You even accused Major Furry of going to fire you after the scheduled MEI (tentatively set for August - September time frame).[3] Your false accusations made to management was not becoming of a cooperative employee.
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> * * *
>
> 3. Attachment 1 to AFR 40-750, Guide to Disciplinary Actions, allows a "Reprimand" as the typical first offense penalty for the infraction with which you are charged. Department of the Air Force policy concerning disciplinary action is that it is preventive in nature, that when used, it is intended to be constructive and rehabilitative and is for the sole purpose of correcting offending employees and problem situations, thereby maintaining discipline and upholding the moral among other employees. After my investigation of the above incident, it is my decision that your conduct warrants disciplinary action. This reprimand is effective upon receipt of this letter and will remain in your official personnel folder for a period of two years. The reprimand will also be placed on your AF Form 971, for a period of two years. At the end of two years, it will be removed from your official personnel folder and your AF Form 971 record and destroyed. I feel that this reprimand supports the Air Force policy. You are further advised to avoid future offenses which could subject you to more severe disciplinary action up to and including removal from Federal Service. (Joint Ex. 7).
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> * * *

Since the letter of reprimand, Mrs. Waldrop has filed additional grievances and has, in Major Furry's view, "conducted herself in a professional manner" during the meetings on such grievances.

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[3] No evidence was introduced as to the alleged "scheduled MEI" statement. Respondent does not assert that other assigned reasons would alone have led to the reprimand in question.

B. Discussions and Conclusions

The issues for determination are whether Respondent, by reprimanding Mrs. Waldrop for calling her supervisor a Hitler during the course of a grievance meeting, violated section 7116(a)(1) of the Statute by interfering with, restraining, or coercing the employee in the exercise of any right under the Statute, and/or section 7116(a)(2) by encouraging or discouraging membership in a labor organization by discrimination in connection with hiring, tenure, promotion, or other condition of employment.

Mrs. Waldrop's participation in the presentation of her grievance was a right protected by the Statute. See section 7121(b)(3)(B). Her right to participate in the discussion of the grievance was also incorporated into the parties' negotiated grievance procedure. See Joint Ex. 1, Article XXI, Section 10b(2). The Authority, in Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, 2 FLRA No. 7, 2 FLRA 54 (1979), has adopted the following standard for determining whether an employee may be disciplined for intemperate language and conduct occurring during the course of protected activity:

> In the Authority's view flagrant misconduct by an employee, even though occurring during the course of protected activity, may justify disciplinary action by the employer. On the other hand, not every impropriety committed during such activity is beyond the ambit of protected activity. The employee's right to engage in protected activity permits leeway for impulsive behavior, which is balanced against the employer's right to maintain order and respect for its supervisory staff on the jobsite.

A similar standard governs the private sector. As the court stated in United States Postal Service v. NLRB, 652 F.2d 409 (5th Cir. 1981), at p. 411:

> This conflict typically arises in cases where an employee has been disciplined for conduct that occurred during the course of the grievance meeting. See, e.g. NLRB v. Florida Medical Center, Inc., 576 F.2d 666, 671-73 (5th Cir. 1978) (employee called administrator "a Mafia director"); Crown Central Petroleum Corp v. NLRB, [430 F.2d 724 (5th Cir. 1970)] (employee accused a superintendent of lying). The Act has ordinarily been interpreted to protect the employee against discipline for impulsive and perhaps insubordinate behavior that occurs during grievance

> meetings, for such meetings require a free and frank exchange of views and often arise from highly emotional and personal conflicts. Both the Board and the courts have recognized that some tolerance is necessary if grievance meetings are to succeed at all; as we have noted before, "bruised sensibilities may be the price exacted for industrial peace." Crown Central Petroleum Corp. v. NLRB, supra, at 731. See Bettcher Manufacturing Corp., 76 N.L.R.B. 526 (1948). In some cases, however, the employee's conduct during the meeting has been found to be so opprobrious or disruptive that the Act's protection must give way to the employer's right to maintain discipline in its establishment. When the employee's conduct during a grievance meeting is "indefensible under the circumstances," the employer may indeed discipline the employee without violating the Act. NLRB v. Florida Medical Center, Inc. supra, at 673.

The question is whether Mrs. Waldrop's remarks were within the ambit of protected activity, allowing leeway for impulsive behavior, or were so outrageous and insubordinate as to be indefensible under the circumstances, thus constituting flagrant misconduct, appreciably impinging upon the employer's right to maintain order and respect for its supervisory staff and justifying discipline as outside the protection of the Statute.

As the Respondent suggests, the various factors to be considered in striking the balance, should include (1) the place and subject matter of the discussion, (2) whether the employee's outburst was impulsive or designed, (3) whether the outburst was in anyway provoked by the employer's conduct, and (4) the nature of the intemperate language and conduct. See Atlanta Steel Co., 102 LRRM 1247 (NLRB, 1979).

Mrs. Waldrop's statement, "You are a Hitler" occurred during the course of the grievance meeting in Major Furry's office and behind closed doors. The location and circumstances of the meeting made it a sanctuary where it could reasonably be expected that a full, free, and frank exchange of views would be fully aired by the personnel most directly involved. The fact that at least one bargaining unit employee, the supervisor's secretary, was momentarily disturbed, as the loud remark filtered through the closed doors of her supervisor's office, does not, in my view, change the conclusion that the remark was made in an appropriate setting. The remark was made during the course of a closed grievance meeting and not as a calculated flagrant act of insubordination in front of other employees. See Boaz Spinning Co. v. NLRB, 395 F.2d 512, 68 LRRM 2393 (5th Cir. 1968) (employee fired for interrupting a manager's anti-union presentation in front of all employees and calling him, in part, "no different than Castro").

The remarks were impulsive rather than designed. They came near the end of a 30 minute meeting. There were made during the heat of a prolonged disagreement over whether Mrs. Waldrop could discuss matters other than the specific grievance during the course of the grievance meeting. The supervisor was continually cutting Mrs. Waldrop off from telling her "story". Although her actions in attempting to go into other matters interfered with orderly procedure and the supervisor's attempt to elicit facts underlying the specific grievance, her remarks basically reflected her frustration with the procedures being employed. The remarks, "You are a Hitler," while intemperate, abusive, and insulting, were used in context to indicate that Mrs. Waldrop considered Major Furry to be extremely unreasonable and to be running the meeting after the fashion of a totalitarian dictator. While the "Hitler" comment is not to be condoned, it can be understood.

Mrs. Waldrop did not engage in any violent activity. The meeting was not brought to a halt,[4] but continued in an orderly manner after Mrs. Waldrop's momentary outburst.

It is concluded that Mrs. Waldrop's statements during the grievance meeting were not indefensible under all of the circumstances and did not constitute flagrant misconduct beyond the ambit of protected activity. Therefore, Respondent's April 30, 1981 letter of reprimand constituted improper interference with Mrs. Waldrop's protected rights in violation of section 7116(a)(1) of the Statute. In reaching this conclusion, I have necessarily recognized existing precedent in which similar, or even more serious, instances of impulsive behavior during the course of presenting grievances, grievance meetings, or other protected activity were examined under similar criteria and found to be within the ambit of protected activity. See Department of Housing and Urban Development, San Francisco Area Office, San Francisco, California, 4 FLRA No. 64 (1980) (steward referred to supervisor as "racist, sexist, and ageist" and, when asked for a letter in order to resolve the grievance, replied, "I'm not going to give you shit"); Veterans Administration Regional Office, Denver, Colorado, 2 FLRA No. 84 (1980) (union president referred to personnel officer as "incompetent" and "malevolent"); Department of the Army, Headquarters, Military Traffic Command, 2 FLRA No. 72 (1980) (Union member of rating panel loudly accused management members of being "indoctrinated by management," "rating unfairly," and being "told how to rate"); Department of the Navy, Puget Sound Naval Shipyard. Bremerton, Washington, 2 FLRA No. 7 (1979) (steward shook his fist in supervisor's face and said, in part, "I am going to get your ass"); U.S. Small

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[4] The Assistant Secretary adopted the comment in Department of the Navy, United States Naval Air Station, Alameda, California, A/SLMR No. 955, 7 A/SLMR 1094, 1099 (1977), "The need to meet with employees and union representatives does not require that meetings be unending or that altercations be extended *ad infinitum*."

Business Administration, Central Office, Washington, D.C., A/SLMR No. 631 6 A/SLMR 158 (1976) (union president ejected from meeting for two or three "damns," one "ass," and one "hell"); NLRB v. Florida Medical Center, Inc., 576 F.2d 666 (5th Cir. 1978) (employee at grievance meeting called administrator "a Mafia director"); Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724, 74 LRRM 2855 (5th Cir. 1970) (employee at grievance meeting, in a loud and heated manner, accused a superintendent of lying).

Since this finding will adequately remedy the violation, it is unnecessary to pass upon whether the reprimand also violated section 7116(a)(2).[5]

II. Case No. 1129

A. Findings

On April 29 or 30, 1981, Geraldine Waldrop, an employee in Respondent's Systems Management Branch, Base Contracting Division, contacted William R. Witham, an employee relations specialist in the Civilian Personnel Office. Mrs. Waldrop requested that Mr. Witham make arrangements so that she could meet with her supervisor. Mrs. Waldrop said that she wanted "to make amends, withdraw the past, and start over." Mr. Witham was aware of Mrs. Waldrop's grievance on the AF-971 entry and of her conduct at the April 23, 1981 meeting, set forth above. Mr. Witham also had a letter stating that Carl Denton, Union president, was Mrs. Waldrop's personal representative. Mr. Witham asked Mrs. Waldrop what her representative thought about such a meeting. Mrs. Waldrop replied that Mr. Denton did not want her to meet with management, but she wanted to anyway.

Mr. Witham contacted Raymond Rush, Respondent's labor relations officer, concerning Mrs. Waldrop's request and her indication that she was not asking for a Union representative. Mr. Rush advised Mr. Witham that, since management was not sure what the meeting would entail, or evolve into, the Union should be given notice and an opportunity to be present.

Mr. Witham arranged the meeting for May 1, 1981. He notified Major Furry that Mrs. Waldrop would like a meeting "to forget, forgive, and what do you expect of me as an employee." Major Furry assumed that Mrs.

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[5] If it were deemed appropriate to pass on this issue, I would find no violation of section 7116(a)(2). There is no evidence of union animus or disparate treatment. The reprimand for the conduct involved is not so inherently destructive of statutory rights as to render unnecessary proof of these elements of the violation. Cf. United States Army, Corpus Christi Army Depot, Corpus Christi, Texas, 4 FLRA No. 80 (1980).

Waldrop wanted forgiveness concerning the actions involving her. These included two notations in her AF-971 file concerning which she had filed grievances, the reprimand for name-calling, and another matter involving alleged discrepancies in her work of posting regulations, which matter had not been fully investigated at the time.

On May 1, 1981, Carl Denton, Union president, received a telephone call from Mrs. Waldrop. Mrs. Waldrop told Mr. Denton that a meeting would be held that day, and, according to Mr. Witham, the Union had the right to be notified. Mr. Denton advised Mrs. Waldrop that neither he nor the Union's vice president could represent her that day, and she should request management to hold the meeting on a different date. There is no evidence as to whether or not Mrs. Waldrop made such a request. However, Mrs. Waldrop later advised Mr. Denton that management had elected to go ahead with the meeting, and that she did not know the Union representative who was present for the meeting.

On May 1, 1981 Mr. Witham instructed Mrs. Waldrop's immediate supervisor, Lt. Hildred Pepper, Jr., to call a Union steward so that the Union would be represented. He said that, under the circumstances, the meeting could be construed as a formal gathering at which the Union had the right to representation.

No Union steward had been designated for the Systems Management Branch, Base Contracting Division, building 861. Therefore, Lt. Pepper telephoned the nearest steward, Billy J. Meldi, who had been designated by the Union as steward for the printing plant, building 700. Lt. Pepper verified that Mr. Meldi was a steward, advised him that Mrs. Waldrop had requested a meeting at which a Union representative would be required, and invited Meldi to attend the meeting to be held in about one hour. Meldi agreed to attend. He had never before been called upon to handle a matter outside of his shop.

The meeting on May 1, 1981 was attended by Mrs. Waldrop, Mr. Meldi, Mr. Witham, Major Furry, and Lt. Pepper. All personnel present, except Mr. Meldi, knew of Mrs. Waldrop's employment problems and the related grievances. The grievances were discussed only in general terms and not in specific detail. Mrs. Waldrop said she was tired of the way everything had been going; that she would like to make amends, clear the air, wipe the slate clean, and start over. She said she felt she was being harassed, and, if management would get off her back, she would become a good and productive employee. She stated that what was in the past was past, and she would just like to do her job, cooperate, start clean, be left alone, and be treated like any other employee. She asked what was expected of her. Major Furry replied that all he expected of any employee was that he or she be cooperative, non-destructive, and productive. He stated that he would treat her just like any other employee. The meeting lasted from 15 to 30 minutes.

On May 14, 1981 Mr. Denton, Union president, protested to Major Furry the fact that Mr. Meldi had been contacted by management to represent the Union at the meeting. Major Furry responded that he had a list of stewards and officers and could call anyone he wanted to; that there were not enough hours in the day for Mr. Denton to represent everyone he wanted to represent.

The unrebutted testimony of Carl Denton, Union president, was that the past practice concerning formal discussions has been that management contacts the Union regarding the formal discussion, and the Union president, or his designee, appoints a representative to attend. An issue did arise in September 1980 concerning whether management committed an unfair labor practice, on the one hand, or was complying with the collective bargaining agreement, on the other, when it dealt with a designated shop steward, instead of the Union president, regarding a change in overtime procedures which would affect the particular steward's shop. The record is not clear as to the final disposition of that controversy.

A labor-management agreement, signed on September 3, 1976, and an amended labor-management agreement, signed on August 1, 1979, were, at all times material, in effect. Section VI of the agreement provided, in part, as follows.

> ARTICLE VI - UNION REPRESENTATION
>
> Section 1: The Employer agrees to recognize the officers of the Union and all stewards duly designated by the Union. The number of stewards shall be the number reasonably required in order to assure that each employee is properly represented. The Employer will, to the maximum extent possible, avoid changing any steward involuntarily from the shift and work area that he held at the time he was designated steward. It is agreed and understood that each steward has authority to represent employees consistent with Section 2 below, for the National Association of Government Employees, Local R7-23. Contacts with the Union by supervisory and management officials will be with stewards and/or officers of the NAGE, Local R7-23.
>
> Section 2: The Union shall notify the Employer in writing of changes to the list of all officers and list of all authorized Stewards, together with the designation of the shop or designated work area each is authorized to represent; in addition, the Union will furnish an updated, complete list in June of each year of all Officers and Stewards. It is understood that the unit supervisors of the Employer, within the scope of their authority, are authorized to speak for

> the employer and conduct business with the Union within the framework of this Agreement.
>
> * * *
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> Section 4: The Employer agrees that the President of the Local, Executive Vice President, First Vice President (WG), First Vice President (GS), First Vice President (Firefighters), First Vice President (Telephone Operators), First Vice President (DECCO), Chief Steward (WG), Chief Steward (GS), after having obtained permission from their supervisors, shall be allowed to leave their shops or offices to go to other shops or offices when necessary to bring about a prompt and expeditious disposition of a grievance, a complaint, or to conduct other authorized business, and that this activity shall be engaged in without loss of pay or benefits. The Employer also agrees that Shop Stewards shall be allowed to leave their shops or offices to go to other shops or offices when necessary to represent an employee in the Steward's assigned area, in order to bring about a prompt and expeditious disposition of a grievance, a complaint, or to conduct other authorized business, and that this activity shall be engaged in without loss of pay or benefits. When requesting permission to leave their work areas, Union officers and stewards will advise their supervisors where they are going and the general nature of the business to be conducted. In performing these activities, the Union officers and stewards will abide by the necessary safety and security regulations. Permission must be obtained from the supervisor in the area the Union officer or steward is to visit. The Employer agrees there will be no restraint, interference, coercion or discrimination against stewards, officers, or representatives because of the performance of these duties.
>
> Section 5: The Employer agrees that the Shop Stewards and Union Officers will be allowed a reasonable amount of official duty time to conduct such authorized Union business as consultation with management; attending joint labor-management meetings; representing the Union on panels and committees; representing an employee in a grievance; and reviewing personnel policies and procedures. * * *

Article XXI sets out the negotiated grievance procedure. In addition, Article XXIII, section 8d provides that meetings, other than meetings of the Union-Management Committee, may also take place on an as-needed basis between the stewards of the shops or sections, and the appropriate head of these shops or sections for the purpose of discussing problems or potential problems of mutual interest within the shop or section.

B. Discussion and Conclusions

The complaint alleges, in substance, that Respondent violated section 7116(a)(1) of the Statute by holding a formal discussion with an employee and unilaterally assigning a Union steward to represent the employee, thereby interfering with the Union's right to designate its own representative.

Respondent contends that the meeting was not a formal discussion requiring the presence of the Union, but, if it were, Respondent satisfied any duty it had by notifying Mr. Meldi, a duly authorized and appointed steward.

The meeting involved was scheduled in advance. It was held in the office of the division chief. In addition to the employee and the Union steward, the meeting was attended by the division chief, branch chief, and an employee relations specialist from the civilian personnel office. In view of these circumstances, and what was actually discussed, as discussed in greater detail below, the meeting was "formal" in nature within the meaning of section 7114(a)(2)(A) of the Statute.[6] Cf. Internal Revenue Service, Fresno Service Center, Fresno, California, 7 FLRA No. 54 (1981).

The subject of the meeting concerned Mrs. Waldrop's desire to make amends for employment conduct which Respondent had found offensive so that she could clear the air and start over. All personnel present, except for the Union steward, Mr. Meldi, knew of Mrs. Waldrop's employment problems and her related grievances. Therefore, the grievances were discussed only in very general terms. However, I find that this discussion was inextricably intertwined with the existing grievances. In addition, Mrs. Waldrop expressed the complaint that she

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6/ Section 7114(a)(2)(A) of the Statute provides:

> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at --
>
> > (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general conditions of employment. . . .

was being harassed and inquired what was expected of her in order to be left alone and treated like any other employee. This constituted a complaint concerning a matter "relating to the employment of the employee" within the scope of the definition of a "grievance" contained in section 7103(a)(9). In view of all the circumstances, it is concluded that the subject of the meeting concerned a "grievance" within the meaning of section 7114(a)(2)(A). Cf. Internal Revenue Service, Fresno Service Center, supra.

As the meeting conducted on May 1, 1981 was a formal discussion and concerned a grievance, the Union was entitled under the Statute to have the opportunity to be represented at that meeting. Respondent contends that it notified the nearest steward of the meeting, as it was authorized to do by the collective bargaining agreement, and, thus, fulfilled its obligation to afford the exclusive representative the opportunity to be represented.

Section 7103(12) of the Statute defines collective bargaining in terms of the "mutual obligation" of the parties to consult and bargain in good faith. Thus, the collective bargaining relationship requires that each party deal with the other directly and in a dignified manner. See United States Air Force, Air Force Logistics Command and Local 221, AFGE, AFL-CIO, 4 FLRA No. 70 (1980); Norfolk Naval Shipyard, Portsmouth, Virginia and Tidewater Virginia Federal Employees Metal Trades Council, 6 FLRA No. 22 (1981). As part of this responsibility, the Authority has concluded that an exclusive representative is entitled to prior notice of formal discussions within the meaning of section 7114(a)(2)(A) so that the exclusive representative will have the opportunity to select representatives of its own choosing to be present. Internal Revenue Service, Fresno Service Center, Fresno, California; Norfolk Naval Shipyard, Portsmouth, Virginia and Tidewater Virginia Federal Employees Metal Trades Council, both supra. It is also clear that a waiver of statutory rights must be clear and unmistakable. Department of the Air Force, Scott Air Force Base, Illinois, 5 FLRA No. 2 (1981).

The collective bargaining agreement provides for the designation of Union stewards; an annual designation by the Union of the shop or designated area each steward is authorized to represent; that shop stewards shall be allowed to leave their shops to go to other shops or offices when necessary to represent an employee in the steward's assigned area or to conduct other authorized business; that shop stewards and Union officers will be allowed a reasonable amount of official time to conduct such authorized Union business as consultation with management, attending joint labor-management meetings, representing an employee in a grievance, and reviewing personnel policies and procedures; and that meetings may take place on an as-needed basis between shop stewards and the appropriate head of these shops or sections.

The language of the agreement fails to show a clear and unmistakable waiver of the Union's right to select its own representative to attend a formal meeting in the circumstances presented, or that, arguably, where there is no designated steward for an area, management may provide notice of a formal meeting to "the closest steward" or to any other steward it so desires.[7]

The record does not otherwise establish that steward Meldi was an appropriate individual to receive notice, on behalf of the Union, of formal meetings in the base contracting division. Meldi was the designated steward for the printing plant. However, there is no evidence that he was the established point of contact with the Union for matters in any other shop, such as the base contracting division, or that he customarily attended formal discussions in any other shop. In fact, he had never handled a matter for the Union outside of his own shop. It is clear that Meldi, who was invited to attend the meeting in his capacity as a steward, was not fulfilling the role of the chosen respresentative of the exclusively recognized labor organization as contemplated by section 7114(a)(2)(A). Cf. U.S. Army Headquarters, et al., Fort Jackson, South Carolina, A/SLMR No. 242, 3 A/SLMR 60 (1973).

On the other hand, Carl Denton had not only been designated as Mrs. Waldrop's personal representative, but he was the Union president. The past practice had been that either he, as Union president, or his designee, would appoint the Union representative to attend formal meetings.

In this posture, Respondent was obligated to give notice of the formal meeting to the Union official (Denton), who was authorized to represent the particular employee and customarily attended formal discussions on behalf of the Union. Cf. Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, 1 FLRA No. 88 (1979). Respondent's notice to Meldi was not equatable with affording the Union an opportunity to be present by representatives of its own choosing. Respondent's argument is not persuasive that Meldi, as the Union's agent, could have passed on the information to the Union hierarchy so that a representative of its choice might have attended. Respondent is obligated, as the Authority has noted, to deal with the Union "directly and in a dignified manner."[8] Accordingly, it is concluded that the Respondent violated section 7116(a)(1), as alleged, because of its failure to comply with section 7114(a)(2)(A).

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[7] In my view, this case does not involve essentially differing and arguable interpretations of the agreement, which, as urged by Respondent, are properly resolved within the grievance and arbitration procedures in the negotiated agreement. Rather, it concerns whether a party to an agreement has given up rights under the Statute, which are properly determined in an unfair labor practice proceeding. Cf. Internal Revenue Service, National Office, Office of International Operations, A/SLMR No. 1079, 8 A/SLMR 764 (1978).

Based on the foregoing findings of fact and conclusions, it is recommended that the Authority issue the following order:

Order

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Federal Service Labor-Management Relations Statute, the Authority hereby orders that the Respondent, Department of the Air Force, Scott Air Force Base, Illinois shall:

1. Cease and desist from:

    (a) Failing to provide the National Association of Government Employees, Local R7-23, appropriate prior notification of, and opportunity to be represented at, a formal discussion between one or more representatives of the agency and one or more employees in the unit concerning a grievance.

    (b) Reprimanding Geraldine Waldrop, or any other employee, because of protected statements made during the course of a grievance meeting.

    (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

8/ In American Federation of Government Employees, AFL-CIO and U.S. Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, 4 FLRA No. 39 (1980) the Authority upheld the Union's refusal to negotiate an agency proposal which would have infringed the Union's prerogative to designate its own representatives when dealing with agency management in the performance of certain representational functions. However, the Authority observed, "This is not to say, however, that a Union may not, if it so elects, bargain over such matters. Indeed, there is merit to formalizing the bargaining relationship to the extent that it would lead to stability in the workplace and, in fact, many collective bargaining agreements in the Federal sector provide for a formalized bargaining relationship."

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Provide the National Association of Government Employees, Local R7-23, with appropriate prior notification of, and opportunity to be represented at, any formal discussion between one or more representatives of the agency and one of more employees in the unit concerning a grievance.

(b) Revoke, rescind, and remove from its files all references to the April 30, 1981 written reprimand of Geraldine Waldrop, revise any subsequent disciplinary action accordingly to the extent required by law and regulation, and advise Geraldine Waldrop in writing of such action.

(c) Post at its facilities copies of the attached Notice marked "Appendix" on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Commander, 375th Air Base Group, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to 5 C.F.R. Section 2423.30 notify the Regional Director, Federal Labor Relations Authority, 175 W. Jackson Boulevard, Suite A-1359, Chicago, Illinois 60604 in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

Garvin Lee Oliver

GARVIN LEE OLIVER
Administrative Law Judge

Dated: May 20, 1982
Washington, D.C.

[5-CA-1129; 5-CA-1131]

APPENDIX

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail to afford the National Association of Government Employees, Local R7-23, appropriate notification of, and opportunity to be represented at, a formal discussion between one or more representatives of the agency and one or more employees in the unit concerning a grievance.

WE WILL NOT reprimand Geraldine Waldrop, or any other employee, because of protected statements made during the course of a grievance meeting.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL provide the National Association of Government Employees, Local R7-23, appropriate prior notification of, and opportunity to be represented at, any formal discussion between one or more representatives of the agency and one or more employees in the unit concerning a grievance.

WE WILL revoke, rescind, and remove from our files any reference to the April 30, 1981 written reprimand of Geraldine Waldrop, revise any subsequent disciplinary action accordingly as required by law and regulation, and advise Mrs. Waldrop in writing of such action.

____
(Agency or Activity)

Dated: __________________ By: ____________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning the Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Federal Labor Relations Authority, 175 W. Jackson Boulevard, Suite A-1359, Chicago, Illinois 60604, whose telephone number is (312) 886-3468.

[8-CA-20003]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND

(Respondent)

and

Case No. 8-CA-20003

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on June 29, 1982, finding that the Respondent had not engaged in any unfair labor practice as alleged in the complaint, and recommending that the complaint be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (5 CFR 2423.29 (1982)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusion, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., August 27, 1982

James J. Shepard

James J. Shepard, Executive Director

[8-CA-20003]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

Case No.: 8-CA-20003

Wilson Schuerholz, Esq.
For the Respondent

Deborah Wagner, Esq.
Joseph Swerdzewski, Esq.
For the General Counsel

Jeffrey H. Dasteel
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on December 21, 1981 by the Regional Director for the Federal Labor Relations Authority, Los Angeles, California Region, a hearing was held before the undersigned on March 16, 1982, at Los Angeles, California.

This is a proceeding under the Federal Service Labor-Management Relations Statute (herein called the Statute or the Act). It stems from a first amended charge filed on December 4, 1981, by American Federation of Government Employees, AFL-CIO (herein called the Union), against Social Security Administration, Baltimore, Maryland (herein called the Respondent).

The Complaint alleged, in substance, that on or about September 17, 1981, Respondent unilaterally changed working conditions of employees at its Compton, California Branch office. This change was allegedly accomplished by detailing an employee therefrom to the Los Angeles Teleservice Center on said date without notifying the Union or providing it with an opportunity to bargain over the impact of such change upon its employees.[1] The foregoing conduct was alleged to be violative of Sections 7116(a)(1) and (5) of the Statute.

Respondent's Answer, dated January 4, 1982, denied such unilateral change in working conditions, i.e., the aforesaid detail without notifying the Union or providing it an opportunity to bargain thereon. It also denied the commission of any unfair labor practices.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and examine as well as cross-examine witnesses. Thereafter, briefs were filed with the undersigned which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. Respondent operates a regional office in San Francisco, California, which includes the Los Angeles West Network. It maintains, as part of that network, a district office in Torrance, California as well as a branch in Compton, California. There is also a Los Angeles Teleservice Center which is part of the Los Angeles Central Network.

2. At all times material herein the Union has been, and still is, the exclusive representative of all General Schedule employees in the San Francisco Region employed by Respondent, excluding management employees, supervisors, guards, professionals, and certain other specified classes of employees.

3. There are approximately 43 individuals employed at the Compton Branch. Lorene DeBose, who is the manager thereat, is responsible for the operation by its staff of all programs handled under Title II and Title XVI of the Social Security Administration. Employed at the Compton Branch are, in addition to clericals and others, service representatives who

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[1] At the hearing the undersigned granted a motion by the General Counsel to amend paragraph 11 of the Complaint by adding the words "and implementation" after the word "impact" therein.

handle post entitlement problems or post eligibility events. These representatives speak to and interview established beneficiaries who desire information in connection with their entitlements, or who have problems in respect thereto. Except for a small percentage of time spent on the phone answering such inquiries, these employees deal with the beneficiaries on a face-to-face basis when the latter come to the Compton office.

4. On or about July 1981, Barbara Beatty and JoAn Morris were the service representatives at the Compton Branch. Beatty had just completed her training and commenced working as a service representative. Morris had been having performance problems since her work was not deemed satisfactory by management. Two other employees at Compton were selected to become such representatives, but they were scheduled to begin training at that time and not start as service agents until September 1981.

5. Manager DeBose testified, and I find, that in 1978 or 1979 the Teleservice Center announced they intended to start a program whereby it would furnish an employee to Compton in exchange for the branch office sending someone to the Teleservice Center. DeBose notified the Union representative, Barbara McDaniel, that the Center planned this exchange as an ongoing program; that the manager intended to inquire whether any employees at Compton would be interested in going to the Center. According to DeBose, the union agent replied she had no problem with the plan so long as it would be voluntary on the part of the employees. Although the Teleservice Center made about three requests each year, no service representatives were detailed thereto from Compton until 1981, since the employees were not interested in leaving the branch office.[2]

6. In or about April 1981, DeBose received a call from Dan Chavez of the Los Angeles West Network, inquiring whether anyone wanted to go to the Teleservice Center on a detail. It was contemplated that the Center would send two individuals to Compton in exchange for one service representative going from the branch to the Center. Beatty, who was later approached in this regard, declared she did not desire to go on the detail since she had been at the Center for training and knew how it operated. JoAn Morris, who was also solicited for the detail, manifested an interest in going. Shortly thereafter Jacklyn Martin, Beatty's supervisor, spoke to said

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[2] Both the Union and Respondent are parties to a written collective bargaining agreement, (Respondent's Exhibit 1) which, by its terms, was operative at all times material herein. Although Article 15 is designated "Promotions, Details and Transfers", the sections thereunder treat with vacancy positions and promotions. No provisions are set forth regarding detailing employees to other locations.

employee regarding the detail. She explained it would be for two weeks; that having two people sent from the Center would help clean up the backlog. Beatty agreed to go on the detail.

7. Prior to Beatty's acceptance of the detail Chavez called the Compton manager again to advise that the detail would take place on September 17, 1981. He explained that the service representative from Compton would handle a routine workload at the Center, which involved answering inquiries and providing information via telephone to those who called the Center. The main purpose, as expressed to DeBose, was to provide exposure for each employee to the work performance at the other locations.

8. Branch manager DeBose discussed the proposed detail at a staff meeting held on or about September 13. She mentioned that it was not certain whether the Teleservice Center would send two people, nor was it definite that the detail would take place. The meeting was attended by Jeannette C. Perkins who had been the Union representative at Compton (and Vice-President of Los Angeles West Network) since December 1980. DeBose stated she made no effort to discuss the details with Perkins since the manager felt that the former Union agent had consented to the arrangement provided the detail was voluntary.

9. On September 15, DeBose informed Beatty she should report to the Teleservice Center on September 17 for two weeks.[3] Beatty reported as per scheduled and remained for the prescribed period. The effect of the assignment was mostly a change in travel and work times. While Beatty traveled the same distance to work as she did to Compton, she spent 35-40 minutes more in getting to work. Further, her hours at the branch office were 7:00 a.m. to 3:30 p.m. whereas at the Center she worked from 8:00 a.m. to 4:30 p.m.[4] At the Center, Beatty handled phone calls from the beneficiaries and she provided the information requested. Beatty supplied the same information as at Compton, except she did so on the telephone. While a backlog existed at Compton - and still was present when Beatty returned - no pending caseload was kept at the Center.

10. In exchange for Beatty's coming to its office, the Center sent Leola Fossell to Compton. Upon her reporting thereat Fossell was assigned to the reception desk. JoAn Morris handled all inquiries from those who

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[3] No attempt was made by Respondent to send JoAn Morris after Beatty agreed to the detail.

[4] Beatty expressed concern to management about these differences prior to the detail. She acknowledged the detail was voluntary on her part, and there was no compulsion that she go to the Center.

appeared at the time, whereas she usually split the alphabet with Beatty. One representative would handle all callers whose last names fell between A-L, whereas the other representative took care of the names from M-Z. While Fossell and JoAn Morris rotated later during the former's detail, as she did with Beatty, Morris testified that she worked 20 hours overtime in these two weeks; that formerly she worked five to seven hours overtime on Saturday.[5] Beatty's testimony reflects that upon her return to Compton she noticed no difference in her cases - they had not been worked on, and the backlog continued to exist.

11. Record facts indicate that in 1979 Barbara Beatty was detailed to Torrance from Compton as a data review technician for two weeks training. She testified that on occasion employees from Torrance were detailed to Compton when the latter office was backlogged; that one other review technician went to Torrance for training. Further facts reflect there have been claims clericals detailed to Torrance from Compton - three or four times in the past three or four years. While service representatives have been sent from Torrance to Compton, no service representatives employed at Compton have been detailed to other locations. The record does not reflect whether such details - other than the one involving Beatty in September 1981 - were voluntary or mandatory in nature.

Discussion and Conclusions

It is asserted by General Counsel that detailing service representative Barbara Beatty from the Compton Branch to the Los Angeles Teleservice Center for two weeks was a unilateral change in working conditions. Contrary to Respondent, it is contended that management had no ongoing program which involved sending service representatives to this Center. Since no such past practice existed, General Counsel insists Respondent was required to, and did not, notify the Union regarding this detail and bargain with the representative in regard to its impact and implementation. Further, it is maintained that substantial impact resulted from the change so as to warrant finding a violation of Sections 7116(a)(1) and (5) of the Act.

An employer in the public sector may not unilaterally change past practices affecting working conditions. Where these involve assignments as details of employees, an agency must notify the bargaining representative and allow it to bargain as to its impact and implementation. Department of Defense, Department of the Navy, Consolidated Civilian Personnel Office, 1 FLRA No. 80; Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, 1 FLRA No. 20, A/SLMR No. 1158.

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[5] Record facts also show she did not work overtime after the detail ended, since her work performance was not considered satisfactory.

Respondent herein contends that it has been the practice for many years to exchange employees between the Compton Branch and other offices in the San Francisco Region. Thus, it argues the detail of service representative Barbara Beatty from the branch to the Teleservice Center was an established and ongoing condition of employment and constituted no change in practice. I disagree. Record facts reflect that on occasion clericals or data review technicians were exchanged between Torrance and Compton. However, such details were neither on a regular basis nor were they arranged with any degree of frequency. Moreover, service representatives were never detailed from Compton to other areas. While it is true that such employees were asked if they desired a detail, the service representative always refused to leave the branch. It is further noted that the duties of those employees differed from those of the claims clericals or data review technicians. Thus, I am constrained to conclude that the detailing of service representative Barbara Beatty from Compton to Teleservice Center was not part of any ongoing program involving this class of employees. Since the service representatives have not been assigned to perform work outside this Branch in the past, I reject Respondent's contention that details of these employees from the Compton office was an existent condition of employment. Contrariwise, I conclude that assigning Beatty, as a service representative, to perform the required duties to the Teleservice Center was a change in working conditions.

Although conceding it gave no notice to Union representative Jeanette Perkins of the intention to detail Beatty from Compton to the Center on September 17, 1981, Respondent takes the position that no such notification was required. The agency argues that the Union had notice when its manager in 1979 or 1980 told the prior Union agent, Barbara McDaniel, that exchanges between the Teleservice Center and the branches would be an ongoing program. Even though such a conversation occurred, I cannot subscribe to the view that it constituted sufficient notice to the bargaining agent so as to embrace the detail involved herein. Apart from the fact that it took place at least a year prior to the event herein, the discussion was general in nature and no mention was made of service representatives. It lacked sufficient specificity to justify being construed as proper notification to the Union of management's detailing service representative from Compton a year later.

A serious question presents itself as to whether the unilateral act by Respondent, in detailing Barbara Beatty from Compton to the Teleservice Center, resulted in a substantial or adverse impact upon unit employees. It is now well established in the public sector that such an effect must be shown before an employer is obligated to bargain upon the impact of its decision. If the effect is de minimis, management will not be faulted for its unilateral action and refusal to negotiate said conduct with the bargaining representative. United States Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, Washington, D.C. and its Central

Region, (5-CA-391). Administrative Law Judges Decisions Report Number 9, April 30, 1982; *Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region*, 5 FLRA No. 45.

In asserting that the detail had a substantial effect upon employees herein, General Counsel relies, *inter alia*, upon *Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region*, Case No. 8-CA-377, OALJ Decision 81-148 (July 31, 1981). The cited case involved assigning two claims clerks to perform the task of back-up receptionists. The duties were performed daily for about seven weeks. Judge Dowd held that the change of duties was sufficient to impose an obligation upon the agency to notify the union and bargain upon requests; that an adverse impact could well result therefrom. It is noted, however, that specific reference was made in the decision that (a) there was a change of duties which, in reality, transferred the job of back-up receptionist from the service representative (who handled this job regularly) to the claims development clerk, (b) the two employees, who were assigned, were not told that the assignment was a temporary or permanent one, and the individuals only know it was for an indefinite duration. In the case at bar, there was no such transfer of duties to other job classifications. Moreover, unlike the aforesaid case, the detail herein was for a set period, i.e. two weeks, and Barbara Beatty was apprised of this fact before she left Compton on September 17, 1981. Further, the detail or assignment herein was a *voluntary* one, and thus it is different to conclude that the impact was adverse to the employees' interests.

General Counsel lays stress upon the following: (a) there was a change in Beatty's duties since she spent nearly all her time at the Teleservice Center answering the phone; (b) the employee's commuting time was extended by virtue of the detail; (c) her hours of work changed at the Center; (d) Beatty's backlog at Compton was not alleviated upon her return thereto.

The foregoing factors do not, in my opinion, constitute a *substantial* impact as urged herein.6/ Beatty's essential function, as service representative, involved talking to social security beneficiaries regarding problems posed to them and answering queries in regard thereto.

6/ A significant change in duty hours may well be construed as having a substantial impact upon employees. This occurred in *Internal Revenue Service, Austin Service Center*, 2 FLRA No. 97, where the agency changed the shift of three employees. The hours of duty were changed from a night shift (5:00 p.m. to 1:30 a.m.) to a day schedule (7:30 a.m. to 4:00 p.m.). Such a change is in marked contrast to the one hour change resulting from the detail herein.

At Compton she met and talked with members of the public in handling this duty. At Teleservice Center she talked with such individuals regarding the same matters on the telephone. While the means of communication differed, the essential task of answering inquiries remained the same. No different knowledge or sources of information was needed by Beatty, and, in essence, her duty to service the public in this regard did not change. These factors differ from those present in Department of Health, Education and Welfare et.al., supra, (30-07868) where claims authorizers were assigned to screen cases, and it was held that such a change could well result in a substantial impact upon such authorizers. In the cited case, however, there was an extreme change in duties: The regular duties of the claims authorizers was to handle and process cases involving awards to beneficiaries, whereas screening involved a summary review of 50-60 cases to determine their complexity and whether they can be handled by the authorizers or others. No such marked change in job function was existent herein.

Note is taken by the undersigned that substantial impact has been found in the past where employees have been detailed to a different area by an employer. Thus, in Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, 1 FLRA No. 3, A/SLMR No. 1101, FLRC No. 78A-136, five employees were sent on a detail for several months to work on special reports in another area. It was held that such matters as overtime, whether the detail was voluntary and on a rotational basis, and the procedure to be followed in selecting the employees were issues which could adversely affect the unit employees. In my opinion the cited case is inapposite herein. No selection process was involved in the present case since the detail was voluntary on the part of the employee, and no rotational factor was in issue. Moreover, no overtime resulted from the detail or was lost because of it.[7]

It is true that the detail for two weeks necessitated Beatty working from 7:00 a.m. to 3:30 p.m. at the Center in contrast to her former schedule of 8:00 a.m. to 4:30 p.m. at the Compton Branch. Further, that she spent about one-half hour more commuting to work at the Teleservice Center. While these two items represented a change, during the two week period, from her schedule while at Compton, I do not view them as substantial. Moreover, it does not appear to the undersigned that unit employees at Compton suffered any serious adverse effects as a result of the assignment. Thus, I conclude that the detail of Barbara Beatty did not produce substantial or adverse impact upon the employees.[8] Accordingly, and particularly in view of the fact that the detail was voluntary on Beatty's part, I conclude Respondent did not violate Sections 7116(a)(1) and (5) of the Statute by failing to negotiate thereon with the Union.

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[7] While Beatty did not work overtime due to the detail, co-worker Morris had overtime of about 13 hours during Beatty's absence. In view of Morris' poor performance record, which required overtime, I do not consider her additional overtime in this period as constituting an adverse impact resulting from the detail.

In view of the foregoing, it is recommended that the Authority adopt the following Order:

ORDER

It is hereby ordered that the Complaint in Case No. 8-CA-20003 be, and it hereby is, DISMISSED.

William Naimark

WILLIAM NAIMARK
Administrative Law Judge

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[8] In view of my conclusion in this regard, I do not deem it necessary to address the issue as to whether the discussion between manager DeBose and the former Union representative in 1979 or 1980 constituted consent by the Union to forthcoming details. Thus, no determination is made herein as to whether such consent, if given, is tantamount to a waiver by the Union to its right to negotiate thereon.

Dated: June 29, 1982
Washington, D.C.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
WASHINGTON, D.C. AND SAN FRANCISCO, CALIFORNIA

(Respondent)

and

Case No. 9-CA-126

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in any unfair labor practice as alleged in the complaint, and recommending that the complaint be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (5 CFR 2423.29 (1982)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusion, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., August 27, 1982

James J. Shepard

James J. Shepard, Executive Director

[9-CA-126]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
1111 20TH STREET, NW., SUITE 416
WASHINGTON, D.C. 20036

DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
WASHINGTON, D.C. AND SAN FRANCISCO, CA

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

Case No. 9-CA-126

Thomas Angelo, Esq.
For the General Counsel

John U. Physioc, Esq.
For the Respondent

Michael Harpold
For the Charging Party

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. § 7101 *et seq.*, (hereinafter referred to as the Statute) and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2410 *et seq.*

Pursuant to a charge filed on July 30, 1979 by the American Federation of Government Employees, AFL-CIO (hereinafter called AFGE and/or Charging Party) against the Department of Justice, Immigration and Naturalization Service, Washington, D.C. and San Francisco District Office (hereinafter called INS and/or Respondent) the General Counsel of the FLRA by the Regional Director of Region 9 issued a Complaint and Notice of Hearing on September 30, 1980. The complaint alleges that Respondent violated Section 7116(a)(1) and (2) of the Statute by the act of INS District Director, David Ilchert in failing to select Michael Harpold for the position of Criminal Investigator, GS-12. Respondent filed an answer denying that it violated the Statute.

A hearing in this matter was conducted before the undersigned in San Francisco, California. The General Counsel of the FLRA, Respondent and Charging Party were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Briefs were filed and have been fully considered.

Upon the entire record[1] in this matter, my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following:

Findings of Fact

A. The Selection of Michael Smirnoff to Fill Vacancy

On March 7, 1979, the Respondent announced a vacancy in the San Francisco District for a Criminal Investigator at the GS-12 level. Mr. Michael Harpold, an Immigration Examiner, GS-11, in the San Francisco District, applied for the vacant position. A selection certificate for the position was referred to the selection official, Mr. David Ilchert, the District Director of the San Francisco District, containing the name of Mr. Harpold, along with six other candidates. Also forwarded to Mr. Ilchert were selection files for each candidate. The candidates were:

NAME	TITLE	GRADE	DUTY STATION
Michael G. Harpold	Immigration Examiner	GS-11	San Francisco
Neville H. Claflin	Criminal Investigator	GS-11	San Fransicco
Ronnie R. Ayers	Supervisory Immigration Inspector	GS-11	Detroit
Gary N. Simmons	Supervisory Deportation Officer	GS-11	Baltimore
Michael Smirnoff	Criminal Investigator	GS-11	San Francisco
Walter E. Murphy	Criminal Investigator	GS-11	San Francisco
Viorel T. Marian	Immigration Examiner	GS-11	San Fransisco

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[1] The Record herein is reopened and a stipulation of parties is hereby received and made a part of the record as Joint Exhibit 9.

Mr. Ilchert selected Mr. Smirnoff for the position on June 25, 1979. The INS's promotion and reassignment procedures for bargaining unit employees are contained in the Merit Promotion and Reassignment Plan, AM 2265, negotiated with AFGE in 1970.[2] Under this plan, two procedures for rating employees exist depending on whether the position involved is in the officers corps or in the non-officer corps. The officer corps consists of positions above the trainee level in occupations and classification series entitled Border Patrol Agent, Criminal Investigator, Deportation Officer, Immigration Inspector, Immigration Examiner, Immigration Officer, and Airplane Pilot GS-2131. All other positions are considered non-officer corps, and can generally be characterized as the administrative occupations and the entry level positions for the officer corps.

Officer corps personnel are rated on an annual basis. All employees eligible for an officer corps rating are supplied with rating material with which they apply for an annual rating. Employees in officer corps positions submit these applications and supervisory appraisals to a rating panel. The panels give ratings based on the appraisals by supervisors, experience, training and development, and overall quality of total qualifications. The weight to be given each criterion is determined by the panel within the guidelines set by the Merit Promotion Program Rating Guide. Those guidelines leave no discretion in the areas of appraisals and experience. For appraisals, employees are given 100 points if all appraisals reflect "highly recommended." Eighty-five to ninety percent of all personnel rated receive "highly recommended" or 100 points. With regard to experience, employees are awarded points in accordance with a formula and chart. Under this procedure, points are awarded based on the length of service at each grade level for the past 15 years. No distinction in points is made in the experience portion for the number of occupations in which an employee has served. Up to three points may be awarded for training and self-development. Up to 13 points may be awarded for overall quality of total qualifications. Points for variety of officers corps experience are awarded in this section. The rating is made on an annual basis, therefore the rating panel is not aware of the positions for which a particular employee may be applying during the upcoming year.

Under the officer corps procedures, when an employee wishes to be considered for any officer corps vacancy, he merely completes an application for consideration form. The seven applicants with the highest numerical ratings (as assigned by the annual rating panel) are placed on the selection certificate. If more than one vacancy exists, one additional applicant is added to the selection certificate for each vacancy. The selection certificate, with a selection file for each candidate on the certificate, is fowarded to the selection official. Under the promotion plan, the selecting official may choose any candidate on the selection list. Selections are to be made without regard to a candidate's sex, race, religion, color, national origin, politics, age, martial status, or membership or non-membership in employee organizations. The selecting official is expected to select the employee he determines would be the most qualified for the particular vacant job that is being filled.

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[2] All employees and positions material in the case are within the collective bargaining unit represented by AFGE.

Mr. Harpold was the most highly rated and ranked employee on the selection list. His overall rating score was 13 points higher than Mr. Smirnoff.[3]

B. Mr. Harpold's Employment History

After some initial investigatory work in the Army and in the private sector, Mr. Harpold began his INS career as a Patrol Inspector, an Officer Corps position, in 1962. He served in that capacity for some six years. During that period, he received training in criminal law and procedure as well as experience in anti-smuggling work which is now performed by Criminal Investigators at the GS-12 level.

In 1968 through 1970, Mr. Harpold was on a leave of absence while serving with the Agency for International Development. He was trained at both the International Policy Academy and the Foreign Service Institute. His duties were to teach law enforcement techniques to the Vietnamese Police. Upon his return to INS in 1970, Mr. Harpold was employed as a Criminal Investigator GS-9. He held that position for one year, at which time he was promoted to the position of Immigration Examiner GS-11.

In general, Immigration Examiners are adjudicative, not investigative, positions that deal with the same laws and law enforcement requirements as Criminal Investigators, including knowledge of when and how to provide Miranda rights. Moreover, Examiners are required to stay current on developments in all aspects of Immigration law. Mr. Harpold was detailed to the Commissioner's staff in 1977 and 1978, but the record does not show in what capacity.[4] Mr. Harpold received an award for outstanding performance in 1967 as a border patrol agent.

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[3] Ten of these points were received due to Mr. Harpold's experience, because he had GS-8-9 and GS-10-11 positions for more years than had Mr. Smirnoff.

[4] Mr. Harpold claims he was setting up the National Anti-Smuggling Program. Mr. Ilchert testified that he believed the detail was in connection with efforts to obtain funds for the INS.

C. Mr. Harpold's Activities on Behalf of AFGE

Between 1971 and 1979, Mr. Harpold was increasingly active in the National INS Council of AFGE. This activity included serving in the following positions:

1971-1976 --- President, AFGE, Local 1616, San Francisco
1976-1978 --- Western Regional Vice-President
1978-1979 --- Executive Vice-President
1973-1979 --- Legislative Director

In February of 1979, Mr. Harpold was elected National President of INS Council of AFGE. For most of the same period, Mr. Ilchert was a manager in the San Francisco District of INS. As a consequence, he and Mr. Harpold often dealt with one another on labor-management issues. As Local President, Mr. Harpold confronted Mr. Ilchert on issues such as productivity levels and employee representational matters.[5]

While Regional Vice-President Mr. Harpold's productivity levels were the subject of some friction. Also, Mr. Harpold represented an applicant for the position of Mr. Ilchert's secretary, who claimed non-selection on the basis of age discrimination. Mr. Ilchert was named the discriminating official and case was resolved with the employee receiving a retroactive promotion and back pay. In 1976 the two men became involved in a controversey over the lightering of Supertankers. The dispute was taken to the press by Mr. Harpold.

Upon election as National President of the Council, a dispute arose between Mr. Harpold and Mr. Ilchert over the kinds of services and facilities to which Mr. Harpold was entitled.

At the time the non-selection of Mr. Harpold took place, a disagreement arose between Mr. Harpold and Mr. Ilchert concerning the "overtime wheel." The overtime system that existed through 1979 required that the employee with the lowest earning be called first for overtime work. Since Mr. Harpold was so frequently absent on labor-managment matters, he was always "low man" and therefore constantly called for overtime work. For reasons relating to the Master Agreement between the parties, and his status as National President, Mr. Harpold contended the system was illegal and refused to participate. Instead, he would "volunteer" for the work. Mr. Harpold's first "refusal" was in May 1979, and he continued to "refuse" assignments through July. He was eventually suspended for 10 days for insurbordination. The disciplinary action was eventually arbitrated and the suspension revoked.

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[5] Mr. Harpold characterized these dealings as emotional and "adversarial."

While the actual disciplinary action occurred in the late summer of 1979, Mr. Ilchert made his internal recommendation that the discipline be issued on June 25, 1979, the same day he selected Mr. Smirnoff and did not select Mr. Harpold.

In addition to the foregoing evidence of protected activity, Mr. Ilchert was also aware that Mr. Harpold was entitled to spend up to 50% of his time on representational functions. Moreover, Mr. Ilchert would be informed whenever such time was used. Mr. Ilchert was aware that Mr. Harpold exercised his right to use 50% of his work time on labor-management matters.

D. Mr. Smirnoff's Employment History

Mr. Smirnoff's career has consisted completely in employment in the Criminal Investigator occupation. He began his employment with the INS as a criminal investigator in New York City. In November 1973, he transferred as an investigator to the San Francisco District, in which occupation he has remained. His job-related training has included prosecution of complex fraud cases; acting as a supervisor, completion of Service schools on Border Patrol, Joureyman Investigations and a self-defense course; enrollemt and/or completion of Service correspondence courses in evidence, investigations, nationality, general background, and deportation and exclusion hearings. Mr. Smirnoff received a quality increase award in 1978, and a commendation in 1976. With regard to appraisals, Mr. Smirnoff was "highly recommended." In connection with his appraisal, his supervisor was extremely laudatory regarding Mr. Smirnoff's ability to handle complex investigations.

E. Other Selections Made By INS

The record establishes that throughout INS numerous officers of AFGE have been competitively promoted or reassigned under the Respondent's merit promotion procedures.

On November 4, 1977, Mr. Gordon Davidson, Mr. Ilchert's Deputy District Director, selected Robert M. Moschorak for Criminal Investigator, GS-12.

In April 1978, Mr. Ilchert selected John R. Raymond, Lawrence J. Augustine, Charles Dills, and Robert M. Marquis for four vacant Criminal Investigators, GS-12 positions in San Francisco. All four were serving as journeymen Criminal Investigators, GS-11 in San Francisco at the time and had been in those positions for a number of years.

Mr. Ilchert selected Ward Leis for promotion from Criminal Investigator, GS-11, to Criminal Investigator, GS-12 in 1976. Mr. Leis was the Vice-President of AFGE Local 1616 at the time.

Mr. Joe Thomas, while serving as President of Local 1616 in the San Francisco District, was selected by Mr. Ilchert for reassignment from Criminal Investigator, GS-11, to a Criminal Investigator position with known promotion potential to GS-12. Mr. Thomas was selected June 30, 1978. His promotion was effective October 22, 1978. At the time Mr. Thomas was selected, Mr. Ilchert selected T. L. Motola for a second vacancy. Mr. Motola was also a journeyman Criminal Investigator in San Francisco.

Ms. Sally Yates, while serving as Vice-President in Local 1616 of the San Francisco District, was selected by Mr. Ilchert for reassignment from a Clerk, GS-5, to Deportation Clerk, GS-5. Her reassignment occurred in October 1978. Ms. Yates contines to be the President of the Local.

Mr. Ilchert selected Frank Parodi, Immigration Examiner, GS-11, for Criminal Investigator, GS-11, San Francisco. Mr. Parodi's record shows employment as an Immigration Inspector, a Criminal Investigator, and an Immigration Examiner. Mr. Parodi's service as a Criminal Investigator occurred from August 1975 to April 1978. It should be noted that the vacancy in question was at the GS-11 level, not the GS-12 level; and that Mr. Parodi had, in fact, performed as a Criminal Investigator at the GS-11 level as recently as 1978.

Discussion and Conclusions

General Counsel contends that Mr. Harpold was not selected for the position of Criminal Investigator, GS-12, because he had engaged in protected activity on behalf of AFGE and that INS's reasons for Mr. Harpold's non-selection are mere pretexts. The burden of proof lies with the General Counsel.

It is undisputed that Mr. Harpold's was an officer of and very active on behalf of AFGE and that INS was aware of Mr. Harpold's union activity.

General Counsel contends that the fact that Mr. Harpold had the highest score on the selection list, some 13 points higher than the selectee, Mr. Smirnoff, establishes that Mr. Harpold was the most qualified person on the selection list for the GS-12 Criminal Investigator position. General Counsel's contention is rejected because it is based on a misinterpretation of the selection process. Members of the officer corps are rated and awarded points annually, not with respect to particular vacancies. When a particular vacancy in the officers corps occurs, individuals who wish to apply do so and candidates are listed according to the points awarded in their annual appraisals. From that list of applicants the seven or so with the highest score are referred to the selecting official for consideration. The selecting official selects the from that list of seven candidates that the selecting official determines to be the most qualified for the particular job. This procedure is followed for all position vacancies in the officer corps. The points awarded are part of an annual appraisal and are done so in relation to each candidate's overall experience, time in grade, longevity etc., but not in relation to whether the candidate is most qualified to fill any particular position or vacancy in the officer corps.

In the instant case the fact that Mr. Harpold had a higher grade on the annual appraisal than Mr. Smirnoff does not establish that Mr. Harpold was more qualified to be a GS-12 Criminal Investigator than Mr. Smirnoff. On the contrary the documents available to Mr. Ilchert established that Mr. Smirnoff's investigative experience was current and far more extensive than Mr. Harpold's, whose most recent investigative experience as GS-9 Criminal Investigator was in 1970. Thus the record establishes that Mr. Ilchert was supported by the information available to him in concluding that Mr. Smirnoff was the most qualified applicant on the promotion list for the GS-12 Criminal Investigator position. Further this action was consistent with Mr. Ilchert's past practice of promoting investigators on the basis of recency and extent of investigative experience.

General Counsel apparently contends that some pattern seems to exist whereby INS and Mr. Ilchert do not select AFGE activists for promotions. On the contrary, the record establishes that both INS nationally and Mr. Ilchert had, in the past, promoted individuals who were officers in and active on behalf of AFGE. Thus General Counsel's contention that there was a pattern of discrimination is not supported by the record and is rejected. In this regard, it is noted that the record contains no evidence to establish union animus on the part of Mr. Ilchert.

It is contended that Mr. Ilchert's, June 25, 1979 recommendation that Mr. Harpold be disciplined for engaging in possibly protected activity is evidence that Mr. Harpold was not selected for promotion on June 25, 1979 for discriminatory reasons. The record, however, does not establish that two incidents were anything more than merely coincidental. The record fails to establish that Mr. Harpold was not selected for the GS-12 Criminal Investigator position because he had engaged in the allegedly protected activity upon which the discipline recommendation was based. Rather, the record establishes Mr. Ilchert chose Mr. Smirnoff to fill the GS-12 Criminal Investigator vacancy because Mr. Ilchert considered Mr. Smirnoff the most qualified of the applicants for the vacant position. It is therefore concluded that Mr. Ilchert's decision not to choose Mr. Harpold to fill the vacant position was not based on unlawful consideration.6/

6/ It is clear the fact that an individual engages in protected activity does not guarantee that individual will be competitively promoted over other applicants regardless of qualifications.

Accordingly, it is concluded that Respondent did not violate Sections 7116(a)(1) and (2) of the Statute and I recommend that the Federal Labor Relations Authority adopt the following:

ORDER

It is hereby ordered that the Complaint in Case No. 9-CA-126 be and hereby is, dismissed.

Samuel A. Chaitovitz
SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: October 7, 1981
Washington, D.C.

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**Federal
Labor Relations
Authority**

Washington, D.C. 20424

Number 14

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

September 16, 1982

UNFAIR LABOR PRACTICE CASES

Case No. 3-CA-741 (August 31, 1982)

Library of Congress and Congressional Research Employees Association (Independent)

Case No. 3-CA-1991 (August 31, 1982)

General Services Administration, National Capital Region and American Federation of Government Employees, Local 2151

Case No. 3-CA-2851 (August 31, 1982)

Bureau of Engraving and Printing and National Treasury Employees Union and NTEU Chapter No. 201

Case No. 5-CA-20009 (August 31, 1982)

Veterans Administration Medical Center, North Chicago, Illinois and American Federation of Governmnt Employees, Local 2107, AFL-CIO

Case No. 6-CA-613 (August 31, 1982)

Army and Air Force Exchange Service, Fort Hood Exchange, Fort Hood, Texas and American Federation of Government Employees, AFL-CIO, Local 1920

Case No. 7-CA-726 (August 31, 1982)

Veterans Administration Medical Center, John Cochran Division, St. Louis, Missouri and American Federation of Government Employees, AFL-CIO, Local 96

Case Nos. 9-CA-931 and 9-CA-1100 (August 31, 1982)

California National Guard, Sacramento, California and National Association of Government Employees

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* This report series includes decisions and orders of FLRA adminsitrative law judges to which no exceptions were filed with the Authority within the prescribed time limit. In accordance with section 2423.29(a) of the Authority's rules and regulations, as amended (46 Fed. Reg. 40674 (1981)), the findings, conclusions, and recommendations in such ALJ decisions constitute, without precedential significance, findings, conclusions, decisions and orders of the Authority.

Y 3.F31/21-3:

[3-CA-741]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

LIBRARY OF CONGRESS

(Respondent)

and

Case No. 3-CA-741

CONGRESSIONAL RESEARCH EMPLOYEES
ASSOCIATION (INDEPENDENT)

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on June 21, 1982, finding that the Respondent had not engaged in any unfair labor practice as alleged in the complaint, and recommending that the complaint be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's Rules and Regulations, as amended (5 CFR 2423.29 (1982)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusion, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., August 31, 1982

James J. Shepard

James J. Shepard, Executive Director

[3-CA-741]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

LIBRARY OF CONGRESS

Respondent

and

CONGRESSIONAL RESEARCH EMPLOYEES
ASSOCIATION (INDEPENDENT)

Charging Party

. . . .

Case No. 3-CA-741

Martin F. O'Donoghue, Jr., Esq.
Douglas Warshof, Esq.
For the Respondent

Jeffrey H. Burton
For the Charging Party

Erick J. Genser, Esq.
Louise B. Richter, Esq.
For the General Counsel, FLRA

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §7101, et seq., 92 Stat. 1191 (hereinafter referred to as the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, §2410 et seq.

A Charge was filed on December 6, 1979 by Congressional Research Employees Association (Independent), (hereinafter called the Union or CREA), against the Library of Congress, and a First Amended Charge was filed on January 7, 1980. Pursuant to the Charge and First Amended

Charge the General Counsel of the FLRA, by the Director of Region 3, issued a Complaint and Notice of Hearing which alleged that Library of Congress failed or refused to comply with the requirements of Section 7114(a)(2)(B) of the Statute and thereby violated Sections 7116(a)(1) and (8) of the Statute. Library of Congress filed an Answer denying that it had violated the Statute.

A hearing in this matter was conducted before the undersigned in Washington, D.C. The General Counsel of the FLRA, Library of Congress and CREA were represented and afforded full opportunity to be heard, to examine, and cross-examine witnesses, to introduce evidence and to argue orally. Post hearing briefs were filed and have been fully considered.

Based upon the entire record in this matter, my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material herein CREA was the collective bargaining representative for a unit composed of professional and non-professional employees of the Congressional Research Service of the Library of Congress. Included within this unit are Bill Digest Clerks. CREA and Library of Congress were parties to a collective bargaining agreement which was effective from September 20, 1979 to March 20, 1981.

At all times material herein Ralph Eads has been a Bill Digest Clerk in the Bill Digest Section of the American Law Division, Congressional Research Services, Library of Congress and his supervisor has been Carolyn Agee, Head, Production Support Unit, Bill Digest Section. Terry Guertin, Head, Bill Digest Section, has been Agee's immediate superior.

During July of 1979 Agee and Guertin met to discuss Eads' job performance. Agee was dissatisfied with Eads' work and she and Guertin decided to give Eads an oral warning, Agee drafted an oral warning letter for Guertin's review and approval. The draft was then forwarded to Hugh Elsbee, Acting Legal Advisor for the Congressional Research Services, for his review and to make sure it complied with the applicable Library of Congress Regulations, LCR 2017-5. After receiving the draft back from Elsbee, Guertin instructed Agee to set up a meeting so that they could give Eads his oral warning.

LCR 2017-5 provides, in part:

> "Section 2. Policy
>
> A. It is the policy of the Library that all employees apply themselves to the duties of their positions during the workday; report for work regularly and on time; observe established time

periods for lunch and rest breaks; comply with the Library's policies and procedures; cooperate with their supervisors and co-workers; be courteous, alert, and considerate in dealings with the public and other employees; and carry out their official duties promptly and efficiently.

B. It is the policy of the Library that supervisors at all levels provide staff members with orientation, on-the-job training, periodic performance appraisal, and counseling toward preparing and encouraging employees to meet initial job performance requirements within a specified time and to meet these requirements thereafter on a continuing basis.

Section 3. Supervisory Counseling

A. When an employee fails to meet the quality and quantity requirements of his position, including attendance, conduct, and relationships with others as they affect performance, the immediate supervisor shall discuss with the employee the ways in which he has failed to meet job requirements and the ways in which he may improve. The supervisor shall, at that time, advise the employee that this discussion constitutes oral warning of the need to improve, and a written memorandum of the discussion and oral warning will be made by the supervisor for his records; the employee shall receive a copy of that memorandum. At the time an employee is counseled or orally warned, if it appears, or if he or she asserts, that the failure to meet job requirements is attributable to a health problem, the employee should be referred to the Health Services Office. The supervisor should also discuss the matter with the Health Services Office and provide it with a copy of any written memorandum.

B. If any employee has indefinite or permanent status, and after receiving oral warnings(s) still fails to meet the requirements of his position, the supervisor shall give him a written warning. That warning shall advise the employee of the ways in which he has failed to meet his job requirements and shall point out the ways in which he may improve. The warning shall further state that the employee shall have 30, 60, or 90 calendar days in which to improve his performance, and that such time period shall begin on the date of receipt of the warning. During that period of time, the supervisor shall keep the employee informed as to his progress.

C. At the end of a warning period, identified in Section 3.B, above, a supervisor shall discuss with the employee whether or not he has improved, and what action, if any, the supervisor shall take. If the employee still has not met the job requirements, the supervisor may recommend the employee's reassignment, transfer, demotion, or separation; in so doing, he shall comply with the provisions of LCR 2020-3.

D. If during or by the end of the warning period, identified in Section 3.B, above, the employee improves sufficiently for retention in the same position, but within a 6-month period following that warning period he again fails to meet the job requirements, no further warnings under this Regulation shall be necessary; the supervisor may initiate an action to reassign, transfer, demote, or separate the employee. In so doing the supervisor shall comply with the provisions of LCR 2020-3.

E. Any written warning given pursuant to this Section shall include:

(1) a specific description of the ways in which the employee fails to meet the requirements of his position;

(2) the ways in which the employee may improve his performance;

(3) the time period (30, 60, or 90 calendar days) in which to improve his performance;

(4) a statement that the supervisor shall be available during this period to help the employee; and

(5) a reference to this Regulation.

F. The requirement for a written warning (Section 3.B., above) shall not apply to employees in the qualifying period.

G. Drafts of written warnings shall be submitted to the Employee Relations Officer for prior review as to compliance with this Regulation."

During the morning of July 17, 1979 Agee called Eads by telephone and asked him to attend a meeting with her and Guertin, in Guertin's office.

Eads inquired as to the subject of the meeting and Agee responded that Eads should attend and find out. Eads asked if he could have a Union representative and was told that he could not. Eads stated that he would not come if he could not have a CREA representative.

Agee advised Guertin of Eads' response. Guertin called Elsbee and inquired whether Eads was entitled to a Union representative at the meeting. Elsbee replied that Eads was not entitled to a representative, but that Elsbee would check further and contact Guertin again. About a half hour later Elsbee called Guertin back and advised Guertin that Eads was not entitled to a Union representative at this type of meeting and instructed Guertin to emphasize to Eads that the meeting was solely a counseling session concerning Eads' work performance.

Subsequently during the morning of July 17, 1979 and in Agee's presence Guertin called Eads on the telephone and asked Eads to come to Guertin's office for a counseling session concerning Eads' job performance. Eads asked if he could have a Union representative at the meeting and Guertin replied that he had checked with the front office and that Eads was not entitled to a representative at this type meeting. Eads reminded Guertin of prior problems he had experienced with Guertin and Agee as well as about a discrimination complaint Eads had filed naming both Agee and Guertin, which was still pending. Eads reiterated that he was not attending the meeting because he could not bring a Union representative.

Guertin then called Joseph Ross, Chief American Law Division, Guertin's superior. Guertin advised Ross of what had happened and recommended that a memorandum be sent to Eads directing him to appear at the counseling session. Later on July 17, 1979 Ross called Eads and asked Eads to attend the meeting. Ross advised Eads that the meeting was to deal with Eads job performance and that Eads would be advised with respect to his job performance, of the things he should cease doing and those he should do in the future and that there was nothing to be afraid of, that it was nothing serious. Eads again requested to have a Union representative present and reminded Ross of the past problems Eads had had with Agee and Guertin, Ross refused Eads' request for Union representation but Ross offered to go as a "referee." Eads replied that he didn't trust Ross either and refused to attend the meeting.

Eads then received a memorandum from Ross dated July 17, 1979. The memorandum entitled "Counseling meeting" recounted the prior three phone conversations, reiterated that Eads had no right to a representative at such a counseling session, and directed Eads to appear at Guertin's office on July 18 for a counseling session. The Memorandum advised Eads that his failure to attend will be treated as an insubordination and would subject him to "such disciplinary or adverse action as management deems appropriate." Eads did not attend the meeting.

Subsequently, Eads received a written memorandum of an oral warning, dated July 18, 1979 for Agee. The memorandum summarized the points that were to be discussed at the counseling meeting. It set forth certain matters which Agee found to be shortcomings in Eads' work performance and urged Eads to improve his "work performance, attendance, and conduct." The memorandum expressly did not address Eads "insuborination" in refusing to attend the scheduled counseling meeting.

On or about August 6, 1979 Eads received a notice of proposed written reprimand for his refusal to attend the July meeting. Eads received a written reprimand for his refusal to attend the meeting dated December 7, 1979, from Gilbert Gude, Director of the Congressional Research Service.

The record establishes that the scheduled counseling meeting was for the purpose of advising Eads of shortcomings in his work performance and instructing Eads as to how to improve. It was not to elicit information from Eads nor to question Eads. Although Eads would have been free to make comments and statements, the meeting was not designed to gain information; rather its purposes was to inform Eads concerning his work performance inadequacies.

Discussion and Conclusions

Section 7114(a)(2)(B) provides:

> "(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at -
>
> (A) . . . -
>
> (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if -
>
> (i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and
>
> (ii) the employee requests representation."

This Section, its legislative history and its meaning have been discussed at length in decisions of the FLRA. See U.S. Department of Treasury, Internal Revenue Service, 8 FLRA 327 (1982); Federal Aviation Administration, St. Louis Tower, Bridgeton, Missouri, 6 FLRA 678 (1981); Lackland Air Force Base Exchange, Lackland Air Force Base, Texas, 5 FLRA No. 60 (1981); Internal Revenue Service, Detroit, Michigan, 5 FLRA No. 53 (1981); U.S. Customs Service, Region VII, Los Angeles, Calif., 5 FLRA No. 41 (1981); U.S. Department of the Navy, U.S. Marine Corps, Marine Corps Logistics Base, Albany, Georgia, 4 FLRA No. 54 (1980); Internal Revenue

Service, Washington, D.C. and Internal Revenue Service, Hartford District Office, 4 FLRA No. 37 (1980); see also United States Air Force, 2750th Air Base Wing Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio, OALJ-81-081 (1981); Department of the Navy, Norfolk Naval Base, Norfolk, Virginia, OALJ-82-06 (1981); and Department of the Treasury, Bureau of the Mint, U.S. Mint Denver, Colorado, OALJ-82-26 (1981), Case No. 5-CA-591, Order of the FLRA issued April 30, 1982.

Initially it must be determined whether the meeting in the subject case was an "examination . . . in connection with an investigation . . .," within the meaning of Section 7114(a)(2)(B) of the Statute. Internal Revenue Service, Detroit, Michigan, supra, dealt with whether an employee was entitled to union representation, pursuant to Section 7114(a)(2)(B) of the Statute, at an annual performance appraisal that involved advising the employee his work performance was unacceptable. The annual performance evaluation was not part of any "investigation" of "misconduct" or "non-performance" nor was it apparently designed to elicit information from the employee. Administrative Law Judge William B. Devaney examined and set forth the legislative history of Section 7114(a)(2)(B) of the Statute at length and after extended and careful analysis concluded that the annual performance appraisal was not the type of meeting encompassed within the meaning of an "examination . . . in connection with an investigation . . ." and thus was not within the purview of Section 7114(a)(2)(B) of the Statute. He concluded, therefore, that the employee was not entitled to Union representation. The FLRA adopted the Administrative Law Judge's Decision without substantive comment. Internal Revenue Service, Detroit, Michigan, supra.

Federal Aviation Administration, St. Louis Tower, Bridgeton, Missouri, supra, involves a counseling session. A supervisor, having observed an employee engage in misconduct summoned the employee to a "counseling" session. The employee was advised that disciplinary action could result and he should get a union representative.1/ The supervisor told the employee that the employee was being charged with using excessive and abusive language and creating a disturbance in the control room. The employee and the union representative insisted the supervisor

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1/ The Union and the agency were parties to a collective bargaining agreement which provided, in part:

Employee Representation

> No disciplinary action may result from a meeting between an employee and his supervisor and/or management official unless the employee is advised that such meeting is for the purpose of discussing discipline or potential discipline, and the employee is allowed Union representation, if he so desires.

investigate the employee's use of the land line. The supervisor replied that was irrelevant and stated that he didn't need to investigate any further and he was going to continue to counsel the employee. The union representative insisted that the supervisor investigate further. When the union representative refused the supervisor's order to be quiet the meeting was terminated with respect to the employee.[2] Administrative Law Judge Burton Sternburg analyzed Section 7114(a)(2)(B) and its application to the situation there in question. He concluded that the fact that meeting was called a "counseling session" was not determinative of whether it came within the purview of Section 7114(a)(2)(B) of the Statute. He concluded that the nature of meeting, not what it was called, determined whether Section 7114(a)(2)(B) of the Statute applies. Judge Sternburg concluded that ". . . whenever the circumstances underlying a meeting make it reasonable to envision a discussion of an employee's conduct which could lead to discipline, the employee is entitled under Section 7114(a)(2)(B) of the Statute to union representation." Federal Aviation Administration, St. Louis Tower, Bridgeton, Missouri, supra at page 686. Judge Sternburg observed that seldom are such meetings devoid of any discussion of the reasons for the employee's conduct, even where the supervisor personally observed the employee's conduct. The Administrative Law Judge was unable to refer to or cite, Internal Revenue Service, Detroit, Michigan, supra, because it had not yet been issued. The FLRA adopted the Administrative Law Judges decision with no substantial comments and did not distinguish nor cite Internal Revenue Service, Detroit, Michigan, supra.

U.S. Department of Treasury, Internal Revenue Service, supra, involved the application of Section 7114(a)(2)(B) to a counseling session. During June, September, and November 1979 an employee's supervisor conducted three separate case reviews of the employee's cases. In each workload review the supervisor concluded that the employee had substantial performance inadequacies and, although there were no oral interviews, the employee received three counseling memoranda during 1979. The employee was advised that both the supervisor and another agency official to meet with the employee the next day. The supervisor, after conducting another case review, prepared a memorandum counseling the employee as to work deficiencies. At the outset of the meeting the employee stated that if the meeting could be detrimental to him, he wanted a union representative. The employee was assured that it was "merely" a counseling session arising out of a case review. The employee was given a memorandum setting forth his work deficiencies and advising him that he had 60 days to improve or be disciplined. After, the employee read the memorandum the supervisor reiterated the memorandum's content and stated that he wanted to counsel him. The supervisor did not discuss the details of individual cases and did not feel it necessary to acquire any additional information from the employee. Administrative Law Judge Randolph D. Mason analyzed, in depth, the cases arising under the National Labor Relations Act with relation to NLRB v. Weingarten, 420 U.S. 251, 88 LRRM 2689 (1975). Judge Mason analyzed the application of Section 7114(a)(2)(B) of the Statute to the facts in the case before him and concluded, relying on his analysis and Internal Revenue Service, Detroit, Michigan, supra, that the meeting was not within the purview of Section 7114(a)(2)(B) of the Statute. He reasoned that, because the supervisor did not ask questions or seek to elicit information from the employee and because the purpose of the meeting was to highlight known deficiencies, the requisite investigatory element was absent and thus, the meeting did not qualify as an "examination of an employee . . . in connection with an investigation . . ."[3] The FLRA in adopting the Administrative Law Judge's Decision made no substantive comment and cited, without comment, Internal Revenue Service, Detroit, Michigan, supra. It did not cite or distinguish Federal Aviation Administrative, St. Louis Tower, Bridgeton Aviation Administration, supra.

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[2] The union representative was subsequently disciplined for refusing to remain silent.

In examining the three FLRA cases discussed above[4] it is noted that each involved a meeting called by a supervisor for the purpose of advising or informing an employee of a shortcoming in the employee's work or job performance concerning which the supervisor was already aware. In each case the purpose of the meeting was to inform the employee of his shortcomings and not to obtain additional information, to ask questions or elicit information. However, in each case there seemed to be an equal likelihood of "discussion" and an attempt by the employee to justify or explain his job performance inadequacies. The only distinguishing factor seems to be that the possibility of discipline was perhaps more immediate in Federal Aviation Administration, St. Louis Tower, Bridgeton, Missouri, supra, then in the other two cases. Such a distinction would hardly seem to have any bearing on whether the basic nature of meeting was investigative or whether it involved an examination of the employee.

The subject case involves a counseling session where the purpose of the meeting was to advise the employee of his job performance shortcomings and to inform him that if he did not improve in a reasonable time he would face discipline. The purpose of the meeting was not to elicit information or to ask questions, although it was recognized that the employee would have an opportunity to comment if he wished and that a "discussion" could reasonably be expected. Based upon Internal Revenue

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[3] Judge Mason did not cite or refer to Federal Aviation Administration, St. Louis Tower, Bridgeton, Missouri, supra, because it had not yet been issued by the FLRA.

[4] Internal Revenue Service, Detroit Michigan, supra; Federal Aviation Administration, St. Louis Tower, Bridgeton Missouri, supra; and U.S. Department of Treasury, Internal Revenue Service, supra.

Service, Detroit, Michigan, *supra* and *U.S. Department of Treasury, Internal Revenue Service*, *supra*, and upon the extensive analysis and fine reasoning of Administrative Law Judge Alan Heifetz in *United States Air Force, 2750th Air Base Wing Headquarters, Air Force Logistics Command, Wright-Patteron Air Force Base, Ohio*, *supra*, I conclude that because the meeting of the subject case did not contain the necessary elements of "examination" and "investigation" it did not qualify as an "examination of an employee . . . in connection with an investigation."5/ Accordingly, Section 7114(a)(2)(B) of the Statute does not provide a right to be represented under these circumstances. But see *Federal Aviation Administration, St. Louis Tower, Bridgeton, Missouri*, *supra*.

For all of the foregoing reasons, I conclude that the meeting in question did not fall within the purview of Section 7114(a)(2)(B) of the Statute and that there was no violation of Section 7116(a)(1) and (8) of the Statute. Since no violation of the Statute was found, I hereby recommend that the Authority adopt the following:

ORDER

IT IS HEREBY ORDERED that the Complaint in Case No. 3-CA-741, be, and it hereby is, dismissed.

Samuel A Chaitovitz
SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: June 21, 1982
Washington, D.C.

5/ This does not mean that the nature of such a meeting might not change during the course of the meeting so as to convert such a meeting to an "examination" within the purview of Section 7114(a)(2)(B) of the Statute.

[3-CA-1991]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

GENERAL SERVICES ADMINISTRATION
NATIONAL CAPITAL REGION

(Respondent)

and

Case No. 3-CA-1991

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2151

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the alleged unfair labor practices and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (5 CFR 2423.29 (1982)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusion, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., August 31, 1982

James J. Shepard, Executive Director

[3-CA-1991]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

GENERAL SERVICES ADMINISTRATION
NATIONAL CAPITAL REGION

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2151

Charging Party

Case No.: 3-CA-1991

Edward P. Denney
For the Respondent

Hugh Hassan
For the Charging Party

Sharon Prost, Esq.
For the General Counsel, FLRA

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §7101 et seq., 92 Stat. 1191 Public Law 95-454, (hereinafter referred to as the Statute) and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. XIV, §2410 et seq.

Pursuant to a charge filed on February 13, 1981 by Local 2151, American Federation of Government Employees, AFL-CIO (hereinafter referred to as AFGE Local 2151 and/or Union) against General Services Administration, National Capital Region (hereinafter called Respondent and/or GSA) the General Counsel of the FLRA, by the Regional Director for Region 3, issued a Complaint and Notice of Hearing on April 30, 1981 alleging that Respondent violated Sections 7116(a)(1) and (5) of the Statute. The Complaint alleges that Respondent failed and refused to bargain in good faith with the Union by unilaterally, and without notice to the Union, changing a condition of employment. Respondent filed an answer that admits jurisdiction but denies that Respondent violated the Statute.

A hearing in this matter was conducted before the undersigned in Washington, D.C. at which time all parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. All parties were given an opportunity to file briefs and the General Counsel for the FLRA filed a brief which has been fully considered.

Based upon the entire record in the matter, my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material herein the Union has been the collective bargaining representative for a unit of Respondent's non-supervisory public building employees in the Washington area, including Utility System Repair Operators. Utility System Repair Operators James Morton, Robert DeLuca, and James Sebold are members of the above described collective bargaining unit assigned to Respondent's Labor Field Office.

During 1980 GSA and AFGE Local 2151 were in the process of negotiating a new collective bargaining agreement to replace their agreement entered into in 1975, which remained in effect pending agreement to a new contract. One of GSA's contract proposals involved changing the eight hour shifts of continuous duty employees[1] to eight and one-half hour shifts which include a one-half hour meal period. The Union did not agree to the proposal, urging the continuation of the then existing practice with respect to continuous shifts. On or about December 10, 1980 the parties were utilizing the mediation process on a number of issues, including the proposal to change the tour of duty of continuous duty employees, and the Union agreed to GSA's proposal that Respondent submit the proposed change in the continuous duty shift to the Federal Services Impasse Panel (FSIP). GSA, by letter dated January 15, 1981, submitted the issue of the change in tours of duty for continuous duty shift to the FSIP.

There were usually only one or two Utility System Repair Operators assigned to the 4:00 p.m. to midnight shift. This was a continuous duty shift. Sometimes one of those assigned was a supervisor, but often it was two non-supervisory employees.

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[1] Continuous duty employees were on continuous duty for the full eight hours of their shift. They did not have set meal periods, but rather ate and took short meal breaks during their shifts and while they were still on call and subject to work.

Upon reporting to work on the 4:00 p.m. to midnight shift, Utility System Repair Operators first shut down the five or so buildings for which they were responsible. These employees then performed scheduled preventive maintanence and responded to emergency calls. Utility System Repair Operators were, at all times, required to wear "beepers" which, when they went off, notified the employees to call to find out about possible emergencies. No set time was designated for meal breaks nor were the employees relieved by another employee for such a meal break. Rather the employees ate whenever they had the opportunity, often taking only 10 or 15 minutes, and sometimes up to 25 minutes, for meal breaks. They were required to continue to wear their "beepers" and frequently, while eating, they were interrupted by the "beepers" to which they were immediately required to respond. They were compensated for eight hours of work.

On or about December 10, 1980 GSA Supervisor John Cook posted a watch schedule for GSA employees assigned to the Labor Field Office. The schedule, to become effective during mid December, provided that the Utility System Repair Operators that had been scheduled to work on the 4:00 p.m. to midnight shift were now required to work from 3:30 p.m. to midnight. GSA did not give AFGE Local 2151 any notice of this change in the shift hours. The employees who worked on the 3:30 p.m. to midnight shift were compensated for eight hours. The reason for making this change was to permit Cook, who was assigned to an earlier shift that ended at 4:00 p.m., to have an overlap with the later shift so he could give the later shift employees work and overtime assignments. At no time were the Utility System Repair Operators, whose shift had been changed, told that they would be required to take a one-half hour meal break for which they would not be compensated.2/ Thus I conclude that the employees' practice with

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2/ Cook testified that he advised Utility System Repair Operators Morton, DeLuca and Sebold of the contents of a Notice dated July 10, 1980. The Notice, directed to "All Area and Building Managers", stated that "These [continuous duty] shifts will become eight and one-half hours with a half hour uncompensated meal period. Cook also testified that this Notice was posted. Morton, DeLuca and Sebold denied Cook discussed the Notice or the one-half hour meal period with them and denied that they saw the Notice posted.

In this regard I credit the testimony of Morton, DeLuca and Sebold, that they had not been told by Cook about the Notice or that they were to take a one-half hour meal break. Their testimony was consistent with what in fact happened and their recollections seemed more accurate than did Cook's. Further the Notice was dated some five months before the change and was directed to "Area & Building Managers", not Utility System Repair Operators.

regard to breaks and meal breaks did not change after the shift was changed to 3:30 p.m. to midnight. The employees continued to eat when they had an opportunity and they did not take formal meal breaks but, rather, spent 10 - 25 minutes eating when they were not busy and they remained "on call" and with their "beepers on" while they ate.

During late January 1981 or early February 1981, Cook discontinued the 3:30 p.m. to 12:00 midnight shift and changed it back to a 4:00 p.m. to midnight shift and the employees continued to be paid for eight hours.

Discussion and Conclusions

The Statute provides that an agency may not change terms and conditions of employment without giving prior notice and an opportunity to negotiate concerning such change to the collective bargaining representative of the affected employees. Making such a change in working conditions without giving the collective bargaining representative the required prior notice and opportunity to negotiate constitutes a violation of Section 7116(a)(5) and (1) of the Statute. cf. Department of the Air Force, Scott Air Force Base, 5 FLRA No. 2 (1980); Department of Treasury, Internal Revenue Service, Jacksonville District, 3 FLRA 631 (1980). A work schedule and the hours of work are among the most basic conditions of employment, as defined in Section 7103(a)(14) of the Statute. In addition Section 7106(b)(1) of the Statute does not encompass the type of work schedule involved in the subject case and thus does not relieve GSA of its obligation to bargain concerning such work schedules.[3] Further, it is clear that such a condition can be established by past practice, as it was in the subject case. cf. Department of the Navy, Newport Naval Base, established 3 FLRA 412 (1980).

Although an Agency might be permitted to make a unilateral change in working conditions, after it has notified the Union of its intention to make such a change and the parties had bargained to impasse about it, that was not the situation in the instant case. Respondent never advised AFGE Local 2151 that GSA intended to change the work schedule and the method for payment of continuous duty shifts, and thus the parties never bargained to impasse concerning it. GSA and the Union, during the course of bargaining for a new contract, had apparently reached impasse on a management proposal to change the method for payment of a continuous duty shift, but never had GSA advised the Union that the change would be implemented. Quite to the contrary, GSA and the Union agreed to submit the contract impasse issue to FSIP for resolution and, in fact, the matter was submitted to FSIP by GSA. Thus, the Union was never apprised that GSA contemplated instituting a change in the work schedule. Further, by agreeing to submit the matter to FSIP, GSA was consenting to be bound by a FSIP resolution of the contract impasse and was therefore not free to institute GSA's contract term prior to the receipt of FSIP's final resolution. cf. Warner Robin Air Logistics Center, A/SLMR No. 912, FLRC No. 77A-138 (1978); and Army Corps of Engineers, Philadelphia District, A/SLMR No. 673, FLRC No. 76A-94 (1977).

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[3] Cf. Internal Revenue Service, Brookhaven Service Center, 5 FLRA No. 64 (1980). This case involves Section 11(b) of Executive Order 11491, which is almost identical to Section 7106(b)(1) of the Statute.

In light of all of the foregoing it is concluded that GSA violated Sections 7116(a)(5) and (1) of the Statute by changing the work schedule of the 4:00 p.m. to midnight shift and by paying the employees for only eight hours, without giving prior notice and an opportunity to bargain about the change to AFGE Local 2151.

Because the 3:30 p.m. to midnight shift was changed back to the 4:00 p.m. to midnight shift during latter January or early February 1981, it would not be appropriate to order that the unilaterally changed shift be reinstituted. However, the record establishes that Morton, DeLuca and Sebold were required and did work the 3:30 p.m. to midnight shift as a continuous duty shift, but were reimbursed for only eight hours, not for the eight and one-half hours to which they were entitled. Accordingly, it is appropriate to order that these employees should be reimbursed for the eight and one-half hours that they worked.

Having found and concluded that Respondent violated Sections 7116(a)(5) and (1) of the Statute, I recommend that the Federal Labor Relations Authority issue the following:

ORDER

Pursuant to Section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and Section 7118 of the Statute, the Authority hereby orders General Services Administration, National Capital Region, shall:

1. Cease and desist from:

(a) Instituting changes in shift schedules or compensation for continuous duty shifts for unit employees without first notifying Local 2151, American Federation of Government Employees, the exclusive representative of its employees, and affording it the opportunity to bargain concerning such changes to the extent consonant with law and regulation.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Give Local 2151, American Federation of Government Employees advance notice of any contemplated changes in shift schedules or in compensation for continuous duty shifts or in any other conditions of employment affecting employees in a unit represented by Local 2151 American Federation of Government Employees and, upon request, bargain, to the extent consonant with law and regulation, with Local 2151 American Federation of Government Employees concerning such contemplated changes.

(b) Pay Utility System Repair Operators Robert DeLuca, James Morton and James Sebold on the basis of eight and one-half hours work for the period that they worked on the 3:30 p.m. to midnight shift during December 1980, January 1981, and February 1981 and make them whole for any back pay that they did not receive during that period because they had been paid on the basis of eight hours of work.

(c) Post at its facilities in Washington, D.C. copies of the attached notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by a responsible official and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Official shall take reasonable steps to insure that said notices are not altered, defaced or covered by any other material.

(d) Pursuant to Section 2423.30 of the Authority's Rules and Regulations notify the Regional Director, Region III, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply herewith.

Samuel A. Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: May 10, 1982
Washington, D.C.

[3-CA-1991]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute changes in shift schedules or compensation for continuous duty shifts for unit employees without first notifying Local 2151, American Federation of Government Employees, the exclusive representative of our employees, and affording it the opportunity to bargain concerning such changes to the extent consonant with law and regulation.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL give Local 2151, American Federation of Government Employees advance notice of any contemplated changes in shift schedules or in compensation for continuous duty shifts or in any other conditions of employment affecting employees in a unit represented by Local 2151 American Federation of Government Employees and, upon request, bargain, to the extent consonant with law and regulation, with Local 2151 American Federation of Government Employees concerning such contemplated changes.

WE WILL pay Utility System Repair Operators Robert DeLuca, James Morton and James Sebold on the basis of eight and one-half hours work for the period that they worked on the 3:30 p.m. to midnight shift during December 1980, January 1981, and February 1981 and make them whole for any back pay that they did not receive during that period because they had been paid on the basis of eight hours of work.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 3, whose address is: 1111 18th Street, N.W., Suite 700, Washington, D.C. 20036, and whose telephone number is: (202) 653-8452.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

BUREAU OF ENGRAVING AND PRINTING

(Respondent)

and

Case No. 3-CA-2851

NATIONAL TREASURY EMPLOYEES UNION
AND NTEU CHAPTER No. 201

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on June 25, 1982, finding that the Respondent had not engaged in any unfair labor practice as alleged in the complaint, and recommending that the complaint be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's Rules and Regulations, as amended (5 CFR 2423.29 (1982)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusion, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., August 31, 1982

James J. Shepard

James J. Shepard, Executive Director

[3-CA-2851]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

BUREAU OF ENGRAVING AND PRINTING Respondent and NATIONAL TREASURY EMPLOYEES UNION AND NTEU CHAPTER NO. 201 Charging Party/Union	Case No.: 3-CA-2851

Suzanne Wilson, Esquire
Mr. Michael Doring
For the Respondent

Carolyn J. Dixon, Esquire
Susan Shinkman, Esquire
For the General Counsel

Mr. William P. Milton, Jr.
For the Charging Party/Union

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq., and the Rules and Regulations issued thereunder, Fed. Reg., Vol. 45, No. 12, January 17, 1980 and Vol. 46, No. 154, August 11, 1981, 5 C.F.R. Chapter XIV, Part 2411, et seq.

Pursuant to a charge filed on September 3, 1981, by the National Treasury Employees Union and NTEU Chapter No. 201, (hereinafter called the Union), a Complaint and Notice of Hearing was issued on February 18, 1982, by the Regional Director for Region III, Federal Labor Relations Authority, Washington, D.C. The Complaint alleges that the Bureau of Engraving and Printing, (hereinafter called the Respondent), violated Sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by virtue of its action in conditioning bargaining upon the withdrawal of outstanding unfair labor practice charges.

A hearing was held in the captioned matter on April 12, 1982, in Washington, D.C. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent submitted post-hearing briefs on May 12, 1982, which have been duly considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.1/

Findings of Fact

The Union is the recognized representative of Respondent's "General Schedule, non-supervisory employees . . . as certified by the Area Director of Labor Management Services Administration on May 25, 1977. . ."

On June 29, 1981, Respondent sent a memorandum to Ms. Blanche Lee, President of NTEU Chapter No. 201, wherein Ms. Lee was informed that there would be a reorganization of the Office of Research and Technical Services, effective August 23, 1981. The memorandum, which was signed by Mr. Charles Palmer, Jr., a Labor Relations Specialist, requested comments and proposals on an attached proposed reorganization plan by July 6, 1981.

Inasmuch as the Union received the memorandum from Mr. Palmer on Thursday, July 2, the last work day before the Union's comments and proposals on the reorganization plan were due, Ms. Lee contacted Mr. Palmer and requested an extension of time for submitting the Union's comments and proposals. According to Ms. Lee, Mr. Palmer informed her that he would grant the requested extension of time if the Union would drop some pending unfair labor practice charges. Ms. Lee stated that the Union would not drop any unfair labor practice charges and noted that

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1/ In the absence of any objection, General Counsel's Motion to Correct Transcript is hereby granted.

there would be no need for unfair labor practice charges if the Respondent would work with the Union.[2]

Subsequently, the matter of the reorganization was assigned to Mr. Milton, a National Representative for the Union, and a meeting was held between the Union and the Respondent on July 20, 1981. Mr. Milton, Ms. Lee and Mr. Lem Tally, Chapter Vice-President, represented the Union at the meeting which was also attended by Mr. Palmer and Mr. Edward Griminski, on behalf of the Respondent. At the meeting the Union requested specific information on the reorganization, including, among other things, the names and positions of the employees which would be affected. The meeting concluded with Mr. Palmer agreeing to compile the information requested by the Union and notify the Union as soon as the information was available.

On August 6, 1981, according to Mr. Milton, he and Mr. Palmer spoke over the telephone. At such time Mr. Milton inquired when the information on the reorganization would be available and informed Mr. Palmer that he, Mr. Milton, would be out of town attending the Union's National Convention in Montreal during the period August 10 - August 14, 1981. In answer to Mr. Milton's inquiry, Mr. Palmer informed Mr. Milton that the information on the reorganization was still being prepared and that he would forward it to him when it was completed.

On August 10, 1981, according to the testimony of Mr. Milton, Mr. Milton received a telephone call from Mr. Tally wherein he was informed that the Respondent intended to implement the reorganization on August 12, 1981. Further, according to Mr. Milton, he was informed by Mr. Tally that he and Ms. Lee had attempted to secure an extension of time from Mr. Palmer and that Mr. Palmer had informed them that he would only grant an extension if the Union dropped its pending unfair labor practice charges. Mr. Milton, then called his Washington, D.C. office and was informed that Mr. Palmer had submitted the requested information on the reorganization and that the covering letter, which bore the date August 5, 1981, requested the Union to submit its proposals on the reorganization by August 12, 1981.

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[2] At the conclusion of Ms. Lee's testimony, the General Counsel made it clear on the record that she was not relying on Mr. Palmer's statement to Ms. Lee, with respect to dropping pending unfair labor practice charges as a condition precedent to granting an extension of time to submit comments and proposals on the reorganization, to establish the allegations of the Complaint. According to the General Counsel, Ms. Lee's testimony was for purposes of establishing that "Mr. Palmer had a propensity for making these kinds of statements, but that the complaint only addresses the incident that [NTEU National Representative William] Milton and Mr. Palmer were involved in." Mr. Palmer testified after Ms. Lee and was not questioned about the July 2, 1981, conversation with Ms. Lee. Accordingly, Ms. Lee's testimony in the above regard stands unrefuted.

The next day, August 11, 1981, Mr. Milton placed a long distance telephone call from Montreal to Mr. Palmer and informed Mr. Palmer that his office had received the information on the reorganization and that the Union wanted to negotiate but needed additional time to submit its proposals. According to Mr. Milton, Mr. Palmer informed him that if the Union would drop some of the pending unfair labor practice charges he would try to grant him an extension of time to file the proposals. When Mr. Palmer told Mr. Milton to put his request in writing, Mr. Milton questioned the necessity for submitting a written request "since he [Mr. Palmer] is going to condition my dropping ULPs." Thereafter, when Mr. Palmer laughed, Mr. Milton informed him that he, Mr. Milton, was going to file an unfair labor practice charge over the "unreasonable notice period." According to Mr. Milton he did not forward any proposals on the reorganization or request an extension of time since Mr. Palmer had made the dropping of the pending unfair labor practice charges a condition precedent to the granting of an extension of time.

Mr. Palmer acknowledged being informed on August 5th that Mr. Milton would be at a Union convention in Montreal the following week and having a telephone conversation on August 11, 1981, with Mr. Milton wherein his, Mr. Palmer's, August 5th letter was discussed. Mr. Palmer testified that upon being informed that Mr. Milton would be out of town he checked with his boss, Mr. Richard Hamilton, Labor Relations Officer, on August 5 about the possibility of extending the period for granting the Union additional time past the August 12, 1981 date mentioned in Respondent's August 5, 1981, letter for the submission of proposals on the reorganization. Mr. Hamilton authorized Mr. Palmer to give additional time only if requested.3/

With respect to the August 11, 1981, telephone call from Montreal, which is the basis for the instant complaint, Mr. Palmer testified that Ms. Simms, who shares an office with him, answered the telephone and

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3/ According to Mr. Palmer, Mr. Milton spoke with Ms. Joanne Simms, another Labor Relations Specialist, on August 5, 1981, and told her that he would be in Montreal. Upon receiving this information from Ms. Simms, Mr. Palmer then spoke to Mr. Hamilton.

turned it over to him. Upon picking up the telephone Mr. Milton "attacked" him and complained that he, Mr. Palmer, had not given him enough time to respond to the reorganization and make proposals. When Mr. Palmer asked if Mr. Milton would like to request an extension, Mr. Milton got mad and started hollering that he did not "have to request anything from labor relations". When Mr. Palmer again asked if Mr. Milton wanted an extension or not, Mr. Milton allegedly replied, "no, I will file a ULP and we will let the Authority decide."

Mr. Palmer denied that during the conversation he ever conditioned the granting of an extension of time to file proposals with respect to the reorganization upon the withdrawal of pending unfair labor practice charges.

Ms. Simms, who sits about four feet from Mr. Palmer and was in the office during the entire telephone conversation between Mr. Palmer and Mr. Milton on August 11, 1981, testified that she did not at any time hear Mr. Palmer say anything to Mr. Milton other than asking him if he wanted an extension of time to file proposals on the reorganization plan. Ms. Simms further testified that she had answered the telephone and that she recognized Mr. Milton's voice since she had often talked to him in her capacity as a labor relations specialist.

Following the conversation with Mr. Milton, Mr. Palmer later went to see Mr. Hamilton, the Labor Relations Officer, and informed him of his conversation with Mr. Milton and that Mr. Milton had declined to request an extension of time for filing proposals.

Discussion and Conclusions

A reading of the above statement of facts makes it clear that resolution of the allegations underlying the instant complaint turns on a determination of credibility between the testimony of Mr. Palmer and Mr. Milton with respect to the substance of the telephone conversation of August 11, 1981.

Based upon his demeanor and the corroborating testimony of Ms. Simms, who answered the telephone and overheard Mr. Palmer's entire conversation with Mr. Milton on August 11, 1981, I credit Mr. Palmer's denial that on August 11, 1981, he conditioned the granting of an extension of time for the submission of the Union's proposals concerning the reorganization upon the Union's withdrawal of pending unfair labor practice charges.

Having credited Mr. Palmer, I further find that the General Counsel has, accordingly, failed to sustain the burden of proof imposed upon him by Section 2423.18 of the Rules and Regulations, and I hereby recommend that the Authority issue the following Order dismissing the complaint in its entirety.

ORDER

It is hereby ordered that the complaint in Case No. 3-CA-2851, be, and hereby is, DISMISSED in its entirety.

BURTON S. STERNBURG
Administrative Law Judge

Dated: June 25, 1982
Washington, D.C.

[5-CA-20009]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION MEDICAL
CENTER, NORTH CHICAGO, ILLINOIS

(Respondent)

and

Case No. 5-CA-20009

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2107, AFL-CIO

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on July 16, 1982, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (5 CFR 2423.29 (1982)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusion, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violation and take affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., August 31, 1982

James J. Shepard

James J. Shepard, Executive Director

[5-CA-20009]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

VETERANS ADMINISTRATION MEDICAL
CENTER, NORTH CHICAGO, ILLINOIS

Respondent

and

Case No. 5-CA-20009

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2107, AFL-CIO

Charging Party

. . . .

Thornton E. Cherry, Esq.
For the Respondent

Donald Draper
For the Charging Party

Sharon A. Bauer, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

Decision

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §7101, *et seq*.

Upon an unfair labor practice charge filed by the American Federation of Government Employees, Local 2107, AFL-CIO (herein referred to as the Union), on October 8, 1981 against the Veterans Administration Medical Center, North Chicago, Illinois (herein referred to as the Respondent), the General Counsel of the Authority, by the Regional Director for Region 5, issued a Complaint and Notice of Hearing on December 16, 1981 alleging

Respondent terminated the employment of Dr. Sanda Loga because she filed a grievance with the Union.

A hearing on the Complaint was held on May 5, 1982 in Chicago, Illinois at which time all parties were represented and afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by the General Counsel and Respondent and the General Counsel also filed a reply brief.[1]

Upon the entire record in this matter, my observation of the witnesses and their demeanor, and from my evaluation of the evidence I make the following findings of fact, conclusions of law and recommendations:

Background

At all times material herein the Union has been the exclusive collective bargaining representative of various employees at Respondent's North Chicago, Illinois facility.

On September 7, 1980 Respondent employed Sanda Loga, Ph.D., as a Health Physicist, Radiation Safety Officer. Her appointment was subject to satisfactory completion of a one-year probationary period. Dr. Loga's immediate supervisor was Dr. Walid Hindo, Chief of Radiology Service at the facility. Beginning in December 1980 Dr. Hindo became dissatisfied with certain aspects of Dr. Loga's work and on February 11, 1981 issued a written counseling to her. Dr. Hindo found Dr. Loga's performance of her duties as Radiation Safety Officer to be "less than optional." The written counseling indicated that the reason for Dr. Hindo's conclusion was what he deemed her ". . . inappropriate and less than complete evaluation and research of causes of recent overexposure to personnel of the Radiology Service." Dr. Hindo's counseling required certain actions on Dr. Loga's part and that Dr. Loga file various reports in connection therewith.

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[1] Briefs were originally scheduled to be filed by June 7, 1982. On June 4 Respondent requested an extension of time to file its brief in that Respondent did not receive a copy of the transcript until June 2. Counsel for the General Counsel had already filed a brief and objected to the request. An extension to June 21 was granted and the General Counsel was granted until July 2 to file a reply brief. In its reply brief counsel for the General Counsel again objects to the grant of the extension and moves that Respondent's brief be stricken, citing counsel for Respondent's failure to abide by the Authority's Rules and Regulations governing timely motions for an extension and the service of such motions on other parties (sections 2423.25 and 2423.22). Counsel for the General Counsel implies that somehow the procedure adopted herein has worked to its disadvantage. However, the procedure followed was designed only to aid the Administrative Law Judge, who obviously was desirous of having a brief by Respondent in this case which involves a serious matter of a discharge and difficult credibility considerations. Further, I fail to see how the General Counsel was disadvantaged or prejudiced in the search for the truth herein: briefing provides no additional evidence and the General Counsel had the last word. Accordingly, the motion that Respondent's brief be stricken is denied.

On February 12, 1981 Dr. Loga replied in writing to Dr. Hindo's counseling, contesting or explaining away point by point the allegations made by Dr. Hindo. By memorandum dated February 17, Dr. Hindo responded to Dr. Loga's reply by, in effect, rejecting her explanations and augmenting his February 11 counseling. Dr. Hindo concluded by informing Dr. Loga:

> ". . . Your efforts in investigation of the incidents as described above as well as the methods used, were lukewarm, requiring a significant amount of prodding which was unnecessary. Hence, I do expect that your level of performance in your duties should improve significantly to match the grade to which you were appointed."

During this period, Dr. Fisher, Chief of Staff at the facility and Dr. Hindo's supervisor, met with Dr. Loga and Dr. Breen, a Union steward, to discuss the counseling. Dr. Breen took the position that Dr. Loga was being subjected to job harassment by Dr. Hindo. Dr. Fisher then met with Dr. Hindo and Dr. Loga and discussed the matters in conflict between them. At Dr. Fisher's request, on February 19, 1981 Dr. Hindo withdrew the February 11 counseling memorandum.

The Evaluation

Dr. Loga's probationary year was to expire in early September 1981 and, as her supervisor, Dr. Hindo was required to certify whether she should be retained. However, Dr. Hindo continued to be displeased with Dr. Loga's job performance and in early August 1981 recommended to Dr. Fisher that Dr. Loga's employment be terminated. Since Respondent originally had difficulty in having the position that Dr. Loga was filling authorized and spent considerable time in filling the position prior to the appointment of Dr. Loga, Dr. Fisher suggested to Dr. Hindo that there might be some way to improve Dr. Loga's performance to his satisfaction and retain her. Dr. Fisher suggested that Dr. Hindo speak with the Personnel Office to determine if it would be appropriate to retain Dr. Loga but indicate on her evaluation that her performance was only marginally satisfactory.

Dr. Hindo acquiesced in Dr. Fisher's suggestion and was advised by Marilyn Denning, Acting Chief, Personnel Service that it was possible to follow the approach recommended by Dr. Fisher. Dr. Hindo decided to retain Dr. Loga out of deference to what he perceived to be Dr. Fisher's desires and accordingly, on August 12, 1981 Dr. Hindo certified that Dr. Loga's work was ". . . of an acceptable level of competence" thereby entitling Dr. Loga to a quality within-grade increase effective September 6, 1981. Dr. Hindo also certified that Dr. Loga's ". . . performance, conduct, and general traits of character" were satisfactory and she should be retained beyond her probationary year. However, in his review of Dr. Loga's performance during her probationary period, Dr. Hindo, inter alia, commented that Dr. Loga had met, but not exceeded the minimum requirements to be retained; listed what he considered to be several "serious deficiencies in her performance of her duties"; and in an overall impression and assessment of Dr. Loga's completed tasks, characterized her performance as ". . . suboptional due to the amount of prodding and persistence required for completion of assigned duties in an acceptable manner."[2/]

On August 12, 1981 Dr. Hindo presented Dr. Loga with his written evaluation of her performance which she read. During the discussion which followed[3/] Dr. Loga indicated she was pleased with receiving a within-grade increase and a "satisfactory" performance rating but found Dr. Hindo's narrative comments to be unjust and unfounded. Dr. Loga asked for specifics on the adverse comments and attempted to address each of them.[4/] Dr. Hindo responded that the deficiencies noted were serious and that her performance on the specified items was "not good enough" and "not satisfactory." Dr. Hindo indicated that Dr. Loga's performance would be discussed again with her in December or January. Dr. Loga requested and was provided copies of the documents constituting Dr. Hindo's certification of her performance.

[2/] At the hearing counsel for the General Counsel sought to introduce evidence through an "expert" witness to rebut Dr. Hindo's adverse evaluation of Dr. Loga. I refused to receive such evidence. In its brief counsel for the General Counsel moves that I reconsider my prior ruling. In my view the evidence sought to be introduced was immaterial at the time of the hearing and is still immaterial to a disposition of the issues herein. Accordingly, the motion is denied.

[3/] Dr. Loga's and Dr. Hindo's versions of what transpired vary substantially. The version recited herein is a composite taken from those portions of the parties' testimony which I credit to have occurred, with substantial reliance on the testimony of Dr. Loga.

[4/] On one item Dr. Loga informed Dr. Hindo that his facts as to the date of a posted report were incorrect, a more recent report having been posted. On August 13, Dr. Hindo acknowledged the error but indicated it did not warrant revising his conclusions on the matter.

Friday, August 14, 1981 was Dr. Hindo's last day of work before leaving on a 2-week vacation to South Carolina. On August 17, Dr. Loga met with Dr. Fisher.[5] At this meeting Dr. Loga objected to Dr. Hindo's adverse comments written on her evaluation and requested his assistance on having the comments removed from her file.[6] Dr. Fisher told Dr. Loga that she should be "happy" - she was being retained beyond her probationary period, had a permanent position and a within-in grade pay increase. Dr. Fisher indicated that a negative evaluation was not that important and, in any event, he would look into the matter and attempt to "make things work out." He suggested that Dr. Loga "calm down" and not contact the Union if she wished his help in the matter.

On August 25, 1981 Dr. Loga filed a grievance with the Union requesting withdrawal of Dr. Hindo's August 12, 1981 adverse comments on his evaluation of her performance.[7] Union steward, Dr. Oksana Mensheha, presented the grievance to Dr. Bonghyun Yoon, the Acting Chief of Radiology. The grievance was addressed to the Chief of Staff, through the Chief, Radiology Services and indicated that the grievance was not satisfactorily settled at "Step One" and was being submitted at the "Step Two" level.[8] Since Dr. Hindo was on vacation, Dr. Yoon verbally requested the Union grant an extension of time to September 3 to respond, which request was made in written form on August 27.

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[5] I rely on Dr. Loga's version of her conversations with Dr. Fisher where their testimony differs. Dr. Loga's recollection was generally more precise and she was less likely to testify in conclusionary terms. Dr. Fisher frequently had to be examined repeatedly on the same subject before a clear answer would emerge.

[6] Dr. Loga was also concerned about what Dr. Hindo, interpreted as "serious charges" made by a Dr. Singh on August 13 concerning Dr. Loga. However, that matter played no part in subsequent events.

[7] On August 18 Dr. Loga had been informed by the Acting Chief, Personnel Service that she could challenge Dr. Hindo's adverse comments on her evaluation through the negotiated grievance procedure and that the August 12 meeting with Dr. Hindo could be considered the first step of that procedure.

[8] The parties' collective bargaining agreement contains a 4-step grievance procedure: Step 1 - oral presentation by the employee with the appropriate supervisor; Step 2 - written presentation by a steward with the "Service Chief" within 15 days from the act in question, the "Service Chief" to meet with the Steward and employee within two days and respond in writing within three days after the meeting; Step 3 - presentation of the grievance to the "Director"; and Step 4 - arbitration.

According to Dr. Hindo's testimony, during the first week of his vacation he reflected on Dr. Loga's entire employment experience and decided then that Dr. Loga's work was not consistent with what he expected out of a Radiation Safety Officer under his supervision. Accordingly, Dr. Hindo concluded that Dr. Loga should be terminated rather than retained. Dr. Hindo testified that nothing particular occurred during his vacation which influenced him to change his mind nor did any displeasure of his colleagues with regard to Dr. Loga's work play a role in his decision.

The Discharge

Dr. Hindo returned to the facility from vacation on August 31, 1981. After seeing a copy of Dr. Loga's grievance on his desk that morning, he met with Dr. Fisher. According to Dr. Hindo, on August 31 he related to Dr. Fisher that he now wished to have Dr. Loga terminated. Although Dr. Fisher at first attempted to dissuade Dr. Hindo, he ultimately relented but cautioned Dr. Hindo to make sure the termination complied with proper Personnel procedures. Dr. Hindo then proceeded to the Personnel Office and made arrangements for Dr. Loga's termination.

According to the testimony of Dr. Fisher, when Dr. Hindo returned from his vacation, and after Dr. Hindo had seen Dr. Loga's grievance, the two met and discussed Dr. Loga's termination. Regarding this conversation Dr. Fisher testified the two discussed the grievance and Dr. Hindo's evaluation of Dr. Loga, and during the meeting Dr. Hindo stated that ". . . if he did strike those comments at that time, then his only recourse would have to be to place an 'x' in the box that recommended termination." Upon cross-examination on this conversation, Dr. Fisher testified that Dr. Hindo ". . . walked into the office and said, 'I'm faced with making a decision' or some other words to that effect, faced with making a decision prior to the end of the probationary period, and I have been asked to remove, or words to that effect." When questioned further as to the "words to that effect", Dr. Fisher testified: "He may have said he was asked to remove those comments, strike those comments, and that he did not wish to do so". Dr. Fisher responded to Dr. Hindo that the decision to strike the comments was Dr. Hindo's. When Dr. Hindo informed Dr. Fisher that his action would be to terminate Dr. Loga, Dr. Fisher replied the decision was appropriate for Dr. Hindo to make at his level of supervision.

Dr. Hindo advised the Personnel Office of the decision that Dr. Loga would be terminated and a removal letter to Dr. Loga, dated September 3, 1981, from the Acting Chief of Personnel Service, was prepared. On September 3 at approximately 3:00 p.m. Dr. Loga was called to Dr. Fisher's office at which time she was handed the dismissal letter and told she was terminated as of that day.[9] Dr. Loga asked if she had any particular period of time to "take care of (her) things" and was told she had one and a half hours to do so. During the very brief meeting Dr. Fisher commented: "I told you to stay quiet; you didn't."

After Dr. Loga's termination no further action was taken on her grievance.

Respondent's Pre-Complaint Position

Respondent's removal letter to Dr. Loga of September 3, 1981 stated:

> "During (the one-year probationary) period your performance has been subject to close review. A review of your record shows that your work performance has been unsatisfactory in terms of expected quantity, quality and the timeliness in which work should reasonably have been completed. You failed to keep your supervisor informed, which resulted in the breakdown of normal communications. As the result of your unsatisfactory performance, the radiation safety program at this Medical Center was adversely affected for employees performing x-ray examinations and for patients undergoing examination. Therefore, it has been determined that you are not suited for the position of Health Physicist, GS-11 at this Medical Center. Consequently the decision has been made to remove you from VA employment during your probationary period."

The Union's President met with the Medical Center Director on September 4, 1981, complained that Dr. Loga's termination was unfair and, pursuant thereto, wrote to the Director on September 17 and requested, inter alia, Dr. Loga's reinstatement. In an undated letter the Medical Center Director responded to the Union President and stated that he "thoroughly reviewed the Union's complaints and Dr. Loga's file material" and commented that the deficiencies noted in her August 12 evaluation ". . . had to be addressed prior to her completing her one year probationary period . . . in hopes that Dr. Loga could improve her overall performance, aptitude and cooperativeness so that retention beyond her probationary period could be possible." The Director's letter concluded:

> ". . . Unfortunately, the reservations noted on Dr. Loga's 10-month follow-up evaluation was (sic) not

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[9] This account is taken from the credited testimony of Dr. Loga. Although Dr. Fisher testified that he gave the dismissal letter to Dr. Loga, he gave no further testimony relating to this incident.

> construed by Dr. Loga as a means of helping her identify deficiencies which had to be corrected.
>
> ". . . I regret that this Medical Center had to release Dr. Loga during her probationary period but we had no other recourse based on her inability to correct those noted deficiencies."

By letter dated November 2, 1981 the Medical Center Director responded to the unfair labor practice charge filed herein on October 8, 1981. In correspondence to a Region 5 Field Agent the Director stated, inter alia:

> ". . . The probationary employee, Dr. Sanda Loga, was informed in writing of deficiencies in her performance during her 10-month evaluation on August 12, 1981. At that time, Dr. Loga was told by the Chief of Radiology Service that she could be removed from her position prior to the completion of her probationary period if the noted deficiencies were not corrected. In anticipation that her performance would improve sufficiently to warrant her retention, Dr. Loga's performance, conduct and general traits were indicated to be satisfactory, and it was recommended that she be retained beyond her probationary period. Her supervisor made it very clear to her that those determinations were tentative in nature.
>
> "On August 24, 1981, Dr. Loga filed a grievance under the negotiated grievance procedure concerning the remarks made about her performance deficiencies on the 10-month evaluation form. While this grievance was pending, the Chief of Radiology Service determined that Dr. Loga's performance had not improved, and she was removed from her position on September 3, 1981.
>
> "The union alleges that the decision to remove Dr. Loga was prompted by the grievance. We deny any such alleged nexus. As indicated, five deficiencies in Dr. Loga's performance were documented during the 10-month evaluation, and it was Dr. Loga's failure to correct these deficiencies which led directly to her subsequent removal. The timing of the removal was dictated by the statutory mandate of a one year examining process (probationary period) imposed by O.P.M. . . ."

Discussion

The General Counsel contends that Dr. Loga was discharged because she filed a grievance concerning the adverse comments contained in her evaluation and that Respondent's claim that she was discharged for poor work performance was merely a pretext.

Respondent contends that no "grievance" under the parties' collective bargaining agreement was ever filed in this case and, in any event, Dr. Loga was discharged for cause. Respondent argues that Dr. Hindo's decision to discharge Dr. Loga was made before he knew of the existence of a grievance.

In support of its claim that no "grievance" was filed, Respondent argues that in order to properly process a grievance under the collective bargaining agreement, Dr. Loga should have, under Step 1, orally discussed the matter with Dr. Hindo. If unsuccessful, Respondent avers, the Union, under Step 2, should have submitted the written grievance to the Service Chief (Dr. Hindo). Respondent reasons that the grievance herein was "technically deficient" in that Dr. Loga did not take her objections back to Dr. Hindo as a Step 1 grievance nor did the Union file the grievance at Step 2 with Dr. Hindo but, rather, filed the grievance at the second step with the Chief of Staff (Dr. Fisher) through the Acting Service Chief (Dr. Yoon), noting that the Chief of Staff plays no part in the matter under the contract.[10]

I find and conclude, in agreement with counsel for the General Counsel, that it is immaterial whether the grievance herein followed the proper contractual steps or was otherwise "technically deficient". It has been long held that an employee who files a grievance under a negotiated collective bargaining agreement is engaged in protected activity and may not be discriminated against as a result thereof and an employer may not take reprisals for such action or otherwise discourage the filing of grievances.[11] It is also clear that what precisely will constitute a grievance has been given a broad definition and interpretation, both under the Statute[12] and under Executive Order 11491, as amended.[13] Accordingly, I conclude that Dr. Loga was engaged in protected activity under the Statute when she filed her grievance and any reprisal taken against her by Respondent with regard thereto, regardless of whether the grievance was being correctly processed under the parties' contract, would be prohibited by the Statute.

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[10] Union Steward Mensheha testified it was the general practice at the facility to file grievances in this manner. The Acting Chief, Personnel Service testified that grievances, as herein, were not routinely sent to the Chief of Staff.

[11] See Department of the Navy, Portsmouth Naval Shipyard, 7 FLRA 766 (1982); Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, 6 FLRA 607 (1981); and United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, Chicago, Illinois, 3 FLRA 724 (1980).

[12] Internal Revenue Service, Fresno Service Center, Fresno, California, 7 FLRA 371 (1982), and United States Department of Treasury, Bureau of Alcohol, Tobacco and Firearms, Chicago, Illinois, 3 FLRA 724 (1980).

Turning now to the question of Respondent's motive for discharging Dr. Loga, I conclude that Respondent discharged her for reasons directly related to her grieving Dr. Hindo's adverse comments on her evaluation. The evidence discloses that Dr. Hindo was dissatisfied with Dr. Loga's performance as Radiation Safety Officer, so much so that in early August 1981 he decided she should not be retained beyond her probationary year. Nevertheless, Dr. Hindo was dissuaded by Dr. Fisher from terminating Dr. Loga's employment and clearly concluded she would be retained. However, it was obviously very important to Dr. Hindo that Dr. Loga's evaluation contain various adverse comments which reflected Dr. Hindo's reservations as to Dr. Loga's work.

Dr. Hindo testified, and Respondent contends, that while on vacation he reassessed the matter and then concluded Dr. Loga should not be retained. I do not credit Dr. Hindo's testimony in this regard and accordingly, reject Respondent's position. No reasons, apart from a reassessment, are advanced as to what prompted Dr. Hindo's reversal. Indeed, Dr. Hindo testified that no additional considerations or inputs from others regarding Dr. Loga's performance were part of this determination. Further, the evidence reveals that Dr. Hindo's alleged decision was not communicated to anyone else until after he became aware that Dr. Loga was pursuing a grievance to have Dr. Hindo's adverse comments removed from her evaluation.

Retention of his comments on Dr. Loga's evaluation was important to Dr. Hindo. Yet, he was obviously aware that his last written adverse remarks concerning Dr. Loga's work (the written counseling of February 11, 1981, *supra*) were withdrawn at his supervisor's request, after Dr. Loga challenged them and the Union interviewed on her behalf. According to Dr. Fisher's credited testimony, it is apparent that Dr. Hindo was deeply concerned on August 31, after becoming aware the grievance had been filed, that he might have to remove his adverse comments from Dr. Loga's evaluation. Further, nowhere in Dr. Fisher's testimony does he indicate that Dr. Hindo informed him on August 31 that he had changed his mind about Dr. Loga during his vacation.[14]

13/ *Department of the Treasury, Internal Revenue Service, Chicago District Office, Chicago, Illinois*, 6 A/SLMR 630 (1976).

14/ I also construe Dr. Fisher's comment to Dr. Loga when handing her the dismissal letter, "I told you to stay quite; you didn't", to be a reference to her pursuit of her grievance.

Based upon the credited testimony and all the facts and circumstances herein, I find that Dr. Hindo's true motive or real purpose in recommending the termination of Dr. Loga, in which Dr. Fisher and Respondent acquiesced, was a fear or concern that Dr. Loga's grievance might result in the removal of Dr. Hindo's adverse comments from her evaluation and, in order to avoid that risk, Dr. Hindo decided to terminate Dr. Loga. Clearly, absent the filing of the grievance, Dr. Loga would not have been terminated.15/

Such finding is further supported by the inconsistent positions Respondent has taken on Dr. Loga's termination. Thus, Respondent, through correspondence from the Medical Center Director to the Union President in response to Union complaints on Dr. Loga's discharge in September 1981, and to the Authority's Region 5 Field Agent on October 8, 1981, supra, originally maintained that Dr. Loga was removed because she failed to improve or correct the deficiencies noted on her August 12 evaluation. However, the evidence does not reveal that Dr. Loga was ever informed that she could be terminated prior to the end of her probationary period if her alleged deficiencies were not corrected and Dr. Hindo, by his own testimony, did not base his decision to terminate Dr. Loga on a failure to improve performance. Rather, at the hearing and thereafter, Respondent's position has been that Dr. Loga was discharged because Dr. Hindo simply changed his mind on vacation regarding the employment suitability of Dr. Loga.16/ As noted by counsel for the General Counsel, a shifting defense or vacillating explanation leads to a strong suspicion and is a recognized indicia of discriminatory motivation.17/

Accordingly, I conclude that since Dr. Loga was released solely because of her pursuit of her grievance, Respondent discriminatorily

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15/ Accordingly, I do not view this as a "mixed motive" case and the test utilized by the Authority in Internal Revenue Service, Washington, D.C., 6 FLRA 96 (1981), is inapplicable herein.

16/ Indeed, the Medical Center Director's letters state a position that appears to be also in conflict with Dr. Loga's September 3 removal letter.

17/ Don Pizzolato, Inc., 249 NLRB 953 at 957 (1980); James F. Standford, Inc., d/b/a Ace Machine Co., 249 NLRB 623 at 634 (1980); Taft Broadcasting Company, 238 NLRB 588 (1978); Springfield Dodge, Inc., 218 NLRB 1429 at 1433 (1975); Woj-Ski, Inc., 214 NLRB 1025 at 1033 (1974); and Sam and Margaret Foods, Inc., d/b/a Clock Restaurant No. Seventeen, 212 NLRB 423 at 431-432 (1974).

terminated Dr. Loga's employment in violation of section 7116(a)(2) and (1) of the Statute.[18/]

Remedy

As part of my recommendation herein I shall order Respondent to reinstate Dr. Loga with back pay. However, when Dr. Loga's employment was terminated a grievance was pending relative to Dr. Hindo's evaluation of her work performance. Upon termination, Dr. Loga's grievance was not processed further. Therefore, in order to fully remedy the violations found herein, I shall also order that Dr. Loga's grievance be reinstated as an active grievance and continue to be processed under the terms of the parties' collective bargaining agreement.

Accordingly, in view of the entire foregoing and having concluded that Respondent has violated section 7116(a)(2) and (1) of the Statute, I recommend the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Authority hereby orders Veterans Administration Medical Center, North Chicago, Illinois shall:

1. Cease and desist from:

    (a) Terminating, and otherwise discriminating against, employees because they have engaged in activities protected by the Federal Service Labor-Management Relations Statute to file or process grievances under the contractual grievance procedure.

    (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

    (a) Offer Dr. Sanda Loga immediate and full reinstatement to her former or substantially equivalent position, without prejudice to her seniority or other

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[18/] Internal Revenue Service et al., 5 FLRA No. 96 (1981); United States Marine Corps, Marine Corps Logistics Base, Barstow, California, 5 FLRA No. 97 (1981); and Department of the Treasury, United States Customs Service, Region IV, Miama, Florida, 8 FLRA 561 (1982).

rights and privileges, and make her whole, consistent with applicable laws and regulations, for any loss of income she may have suffered by reason of her unlawful termination by paying to her a sum of money equal to the amount she would have earned or received from the date of her termination to the effective date of the offer of reinstatement, less any amount earned through other employment during the above-noted period.

(b) Upon request, reinstate Dr. Sanda Loga's August 25, 1981 grievance regarding her August 12, 1981 evaluation and process said grievance under the terms of the parties' collective bargaining agreement.

(c) Post at its North Chicago Medical Center facility copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the facility and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, includiung all bulletin boards and other places where notices to employees are customarily posted. The Director, shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

Salvatore J. Arrigo

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: July 16, 1982
Washington, D.C.

[5-CA-20009]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT terminate, or otherwise discriminate against, our employees because they have engaged in activities protected by the Federal Service Labor-Management Relations Statute to file or process grievances under the contractual grievance procedure.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by the Statute.

WE WILL offer Dr. Sanda Loga immediate and full reinstatement to her former or substantially equivalent position, without prejudice to her seniority and other rights and privileges, and make her whole, consistent with applicable laws and regulations, for any loss of income she may have suffered by reason of her unlawful termination by paying to her a sum of money equal to the amount she would have earned or received from the date of her termination to the effective date of the offer of reinstatement, less any amount earned through other employment during the above-noted period.

WE WILL, upon request, reinstate Dr. Sanda Loga's August 25, 1981 grievance regarding her August 12, 1981 evaluation and process said grievance under the terms of the parties' collective bargaining agreement.

____
(Agency or Activity)

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other materials.

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 5, whose address is: 175 West Jackson Boulevard, Suite A-1359, Chicago, Illinois 60604, and whose telephone number is (312) 886-3468

[6-CA-613]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

ARMY AND AIR FORCE EXCHANGE SERVICE
FORT HOOD EXCHANGE, FORT HOOD, TEXAS

(Respondent)

and

Case No. 6-CA-613

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1920

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on June 24, 1982, finding that the Respondent had not engaged in any unfair labor practice as alleged in the complaint, and recommending that the complaint be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's Rules and Regulations, as amended (5 CFR 2423.29 (1982)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusion, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., August 31, 1982

James J. Shepard

James J. Shepard, Executive Director

[6-CA-613]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

. . . .

ARMY AND AIR FORCE EXCHANGE SERVICE
FORT HOOD EXCHANGE, FORT HOOD, TEXAS

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1920

Charging Party

. . . .

Case No. 6-CA-613

Luther G. Jones, III, Esq.
For the Respondent

Alvaro Garza, Esq.
For the General Counsel

Jimmie Griffith
For the Charging Party

Before: JOHN H. FENTON
Chief Administrative Law Judge

DECISION

Statement of the Case

This proceeding arises under the Federal Service Labor-Management Relations Statute, (5 U.S.C. § 7101 *et seq.*) and the Final Rules and Regulations issued thereunder (5 C.F.R. § 2423.14 *et seq.*). It is based on a complaint issued by the Regional Director of Region VI, Federal Labor Relations Authority, alleging that Respondent violated the Statute by:

> (1) threatening Mary Ruth Dixon "(i)n April, 1980, the exact date being unknown," with a transfer to the night shift because of her Union activities;
>
> (2) carrying out that threat by transferring Ms. Dixon on May 20, 1980.

A formal hearing was held in Temple, Texas on March 12, 1981. All parties were afforded full opportunity to examine witnesses, introduce evidence, and to file briefs. Upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommended order:

Findings of Fact

It is extraordinarily difficult to reconstruct the events at issue here, for not only their time but even their sequence is in large measure unknown. This is, in the main, the consequence of Mary Ruth Dixon's poor memory. Her testimony was confusing and often contradictory.

Respondent operates a large retail sales operation at a number of locations at Fort Hood, Texas. This case involves the Walker Village Shopette, a "7-11" type store managed by John Smart. It is open from 10:00 a.m. to 10:00 p.m. and is manned by two shifts. The day shift begins at 9:45 a.m. and ends at 6:15 p.m. The night shift runs from 2:00 p.m. until 10:30 p.m. Smart has two supervisors on the floor, both of whom work the night shift, and a warehouse supervisor who works the day shift and substitutes for him. Mary Ruth Dixon was at material times the only full-time cashier assigned to the Shopette. The others, who are on call, work from 9:45 a.m. to 4:15 p.m., and from 4:00 p.m. until 10:30 p.m.

Dixon was hired by Respondent in 1974, and worked at a number of locations before arriving at the Shopette in July of 1978. This finding is based on Smart's testimony. Her own, which was repeated, was that she was assigned to that store in "approximately" 1978. She was put on the night shift, although she understood she would work days. She strongly desired day work for domestic reasons. In the autumn of 1979, at a time when, she testified, there was a drop in the number of troops (and hence customers), she prevailed on supervisor Janette Wallace to effectively recommend her transfer to the day shift.[1] Wallace did this, according to Dixon, because she had the most seniority and was a good employee.[2]

Dixon's testimony about her Union office and activities was also far from clear. Since 1975 she has been either a steward or vice-president of the Local most of the time. She asserted that she was vice-president for the entire three years preceding the alleged unfair labor practices of April and May 1980. It appears that Union elections are held in March, and it is clear that she was elected vice-president in March of

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[1] Dixon testified that she believed this change took place in March of 1979. However, she also testified that she was on the night shift when she was placed on a wage survey team in June or July of 1979. That or perhaps another assignment to a wage survey, which required day work, led to a dispute over her entitlement to the seven percent night differential.

[2] Wallace rated Dixon's performance for the year ending October 31, 1979. She gave her a very good in job knowledge, a satisfactory in quality and quantity of work and in initiative, and a marginal (deficient) in adaptability and in cooperation/disposition. With respect to adaptability, Wallace commented that Dixon finds it difficult to adjust, wanting things to go her way. With respect to cooperation/disposition, she commented that Dixon's attitude toward fellow employees, supervisors and customers had been very poor. Her narrative comment was as follows:

> Mrs. Dixon's has a good knowledge of procedures and the requirements of her job as cashier-checker. Her work is normally accurate and seldom needs correcting. Mrs. Dixon's quantity of work is sometimes less than her co-workers for the same time span. She is a moody individual and on some occasions spends too much time in general conversation with customers. She also has requested employees from the shift being relieved to remain on their registers so that she has time to prepare her work area, thus causing other cashier checkers to rush through their closeout procedures in order to check out on time. Mrs. Dixon is openly argumentative with her supervisors and fellow workers concerning her job and work schedule changes, and has difficulity getting along with co-workers. Her lack of tact in dealing with customers has contributed to more customer complaints than for any other employee in the branch.

1980. Respondent's Exhibit 2, a letter from the Union to Respondent dated November 2, 1979, states that one Hilda Hardy then occupied that post. In clarifying her testimony that she held that position during the entire three years, and that Hardy was and was not vice-president during part of that time at the Shopette, Dixon finally said that Hardy had been elected in 1979, had subsequently resigned and that she was appointed vice-president. She estimated that she was out of office three or four months. If, as she testified, elections were held annually in March, it would appear that Hardy was in office from March until sometime after November 9, 1979, and that Dixon was appointed to that office to fill whatever gap remained until March, 1980.

As to her activities, Dixon testified that she represented four people during her last year at work.[3] She was absent, apparently for a week, to attend out-of-town Union training seminars (apparently twice) and served twice as a Union representative on survey teams that studied wages in the area. In addition, she asserted that she received three or four calls per week on "Union matters" (never distinguished from representational duties), which would require her to go to Smart's office, where the only telephone was located. She further stated that her duties as vice-president required her to leave the Shopette three of four times a week.

In January, 1980, Smart was instructed to slightly cut his man hours. In February sales volume increased 17%. In the four months ending May 26 volume was up almost 22% over the corresponding 1979 period, and was up by the same amount, on an average monthly basis, over the entire preceding twelve months. While Counsel for the General Counsel argues strenuously that the figures are meaningless for a number of reasons, including inflation, it cannot be questioned that a sizeable increase in volume occurred.[4] More significantly, Respondent claims that most of the increase occurred during the evening shift hours. Respondent's Exhibit 5 has no probative value for such purposes, but both Smart and supervisor Lillian Davenport testified that the rise in volume disproportionately affected the night shift and General Counsel presented no evidence to the contrary, not even the testimony of Dixon. Her shift overlapped the other one by over four hours. In addition, it was, as noted, her testimony that she was placed on the day shift at a time of declining troop strength, and the evidence is unrebutted that her switch to the night shift followed an increase in troop strength. I conclude that Respondent has established that there was a need to redeploy manpower to the night shift. That, of course, does not end the inquiry whether the selection of Dixon, the sole full-time cashier, was necessary, or was in fact motivated by a desire to punish her for Union activities which allegedly interfered with her day shift work.

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[3] Dixon was slated for transfer to the night shift on June 8, 1980. On June 6 she was placed on workers' compensation because of an injury to her hand. As of the time of the hearing she had not returned to work.

[4] Respondent's Exhibit 3, a Speedletter from Smart to upper management, allegedly intended as justification to the Union of the contemplated change to the night shift, grossly overstates the rise as about $20,000 per month. It in fact averaged about $11,000 per month.

In contrast to Dixon's claim of three to four telephone contacts as well as three to four union related absences per week, both Smart and Davenport recall few occasions on which her work was so interrupted. On cross-examination Dixon was asked if she recalled when and how often her conversations with Smart about the shift change occurred, she responded that "each time there was a problem arising pertaining to me going on grievances, going to seminars, et cetera, Mr. Smart would question me on whether I was supposed to do it on my time or AAFES's time, or I was supposed to answer the phone on my time or whatever, and I informed him that that was part of my duties and I was obligated to do that." As Counsel pressed for an answer to his question about the number of discussions with Smart concerning the shift change, Dixon responded that she had several (meaning one or more); that there were times when it was everyday and time when it was not everyday; that several could mean many times; that it was almost daily; that it was more than a dozen times; and that it was quite frequently. It was obvious that, no matter the effort to focus on shift change discussions, Dixon was concentrating on discussions of her Union activities. When Counsel, again explaining that he did not seek to elicit information about what Smart had to say about her Union activities, asked Dixon to repeat what Smart had to say about the shift change, Dixon responded that "(o)n each occasion . . . he talked to me he always brought up the fact that due to my Union activities he would transfer me back to day (sic) shift so that I would be able to take care of Union matters during day shift." A variation on this theme was that Smart said that, "due to (her) Union activities I have convinced them in the office to transfer you to the night shift so you will be able to take care of your Union activities." Later she testified that "each time I had to go out on a grievance or anything, I was harassed about it."

In addition, Dixon reported that Smart objected to her use of the telephone each time she used it for Union business, from 1978 to the point of her departure. According to her, he would routinely state that he intended to call personnel to see if she was right about the propriety of her use of the telephone. The only time she did not have problems, she said, was when she went on the wage survey, when personnel manager

Reilly told Smart she was going on it.[5] Dixon also said that, in the summer of 1979, when she refused service to a customer without proper ID, and the customer complained, Smart gave the customer a suggestion slip on which to record his complaint. She said that she was in the right, and that she knew of no other instance where Smart had in such a fashion solicited a complaint. Upon complaining to Smart, he allegedly said, "Well you will go to the Union. You are in the Union and that is what you will do." On redirect examination with respect to whether she was a Union official at the time of this incident, she said that she was, but that she might be wrong.

When asked whether she and Smart ever discussed training seminars (apparently a Union sponsored session taking about a week, and out-of-town), Dixon's response was about the same: that Smart occasionally remarked that she had a lot of Union activities, and due to the fact that she was gone a lot he felt she should be put back on the night shift so that she could handle her Union work during the day. Such seminars of course precluded work on either shift.

Dixon denied that Smart ever spoke to her about the business reasons for the shift to night work. Rather, she indicates that in April, probably, she got a call from steward Becky Edwards. Again, she said, Smart told her she was not to receive calls, she told him what the call was about and he again said he would check with personnel to see if she was authorized to receive calls. Again, she explained her official responsibility, and again, he allegedly told her that because she had so many Union activities, like seminars, it would be better for her to go back on the night shift so that she could handle her Union work during the day. She then went to Exchange Manager Jones, who allegedly said he would try to resolve the problem. On the following day, she testified, Smart, in a rude and ugly way reported that he had finally convinced management that she should be placed on the night shift because of her Union activities.

Manager Smart denied talking to Dixon about her Union activities as a reason for the change to the night shift. He asserts that he explained the rise in sales volumes and its particular impact on the afternoon and evening as his reason for changing her assignment, just before he posted the change on May 28, and that she registered no objection. This last point is uncontradicted. He asserted that on no other occasion did he talk to her about placing her on the night shift except in early April. That conversation was precipitated, he said, by her returning from lunch 15 minutes late on three consecutive days and explaining that she had been, on the first two days, to her pet fish store which was not available to her when she worked during its open hours. He said that he angrily told her that if her fish were more important to her than the store, he would try to arrange a change to night work so that she could do her personal shopping before coming to work.

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[5] Apparently the dispute about the wage survey, at least in part, stemmed from Smart's view that Dixon should be paid the day rate because such work occurred in the day, even though she was then assigned to the night shift. Reilly overruled Smart on this issue. General Counsel argues that Smart's position evidences animus against Dixon because of her Union activities. On its face, Smart's view that day work calls for day wage rates is not so unreasonable (if it is, at all) as to suggest animus.

Smart testified that Dixon was out of the store on Union business only two or three times, that he questioned her use of the telephone only once, and that he did not dicuss the wage survey with her except with respect to her failure to return to work when that job ended at 12:00 p.m. He further sought to defend his decision to switch her shift by pointing out that she was a good cashier ("as a cashier") and that her frequent absences could be covered on that shift by the two supervisors. General Counsel points to the unflattering evaluation as undermining her transfer on the ground she was a good cashier, and points to the fact that supervisor Rackley was not on the night shift to substitute for her. While Rackley was a night supervisor at the time of the hearing, and was, in fact, on the day shift in 1980, the evidence strongly indicates that he was substituting for night shift supervisor Wallace at material times. Supervisor Lillian Davenport testified that Smart informed her and Wallace that he was going to put Dixon on the night shift because a good cashier was needed to cover the increasing business, and confirmed Smart's testimony that she was infrequently absent from her register on Union business. While agreeing with Smart that Dixon was a good cashier (the best if she wanted to be - forget it if she didn't), she conceded that it was not sensible to move someone with a poor attendance record to the busier shift.

On recall, Dixon was not asked about the business defense, the discussions concerning her alleged failure to return to work from the survey and her visits to the pet store, or even Smart's claim that she assented to the transfer.

Discussion and Conclusions

I have laid out evidentiary matters at much length, largely because I am unable to make the kind of credibility resolutions, based on demeanor, to which a reviewing body must ordinarily defer. I conclude that General Counsel has not sustained his burden principally because of the nature of the case he presented. The complaint asserts that Dixon was threatened, on an unknown date in April, with transfer to the night shift so as to afford her time to handle Union matters during the day. If Dixon's recollection of events is accurate she has been subjected to such threats and harassment on innumerable occasions for years. Yet no grievance was ever filed and no other witness was found to corrobrate her story. There is not even an indication of the nature of the Union business she was attempting to transact when threatened in April, unless it was the call from steward Becky Edwards, which appears to be the sort of call Dixon claims to have received three of four times a week for several years.

No other Union officer and no employee supported her claim that she was quite busy in representational activities and she does not fix even the approximate time of her representation of the four employees she named. As noted, she was unable to place in time her periods in Union office, her attendance at Union training seminars, her work on the wage surveys, or even her transfer to this store. In short, no precipitating event for the April and May incidents alleged in the complaint has been shown, no witnesses have corroborated any of Dixon's claims, no other evidence was adduced indicative of hostility to the Union, and no evidence was presented which undermines the Activity's economic defense. The gross disparity between the single threat alleged and wholesale threats which Dixon recounted gives rise to suspicion, and her repeated demonstration of inability to recall matters with anything approximating precision gives rise to very serious doubt as to the reliability of her recollection of alleged unfair labor practices.

In sum, I find her testimony of routine harassment and repeated threats so inherently improbable that I cannot credit it in the absence of any evidence tending to support and in the presence of persuasive reason to doubt she recalls anything with reasonable accuracy. While I am inclined to think that she did not make up matters out of the whole cloth - i.e., that something was said to her which she misunderstood as she so often misunderstood the questions of counsel - this kind of record will not suppport a finding that Respondent has violated the law. That is particularly the case where the need to strengthen the second shift was clearly demonstrated, and where Respondent's witnesses denied the major elements of General Counsel's cases in a manner quite as credible as Dixon's. Accordingly, I recommend that the Complaint be dismissed.

John H. Fenton

JOHN H. FENTON
Chief Administrative Law Judge

Dated: June 24, 1982
Washington, D.C.

[7-CA-726]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION MEDICAL CENTER
JOHN COCHRAN DIVISION
ST. LOUIS, MISSOURI

(Respondent)

and

Case No. 7-CA-726

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 96

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding, finding that the Respondent had not engaged in any unfair labor practice as alleged in the complaint, and recommending that the complaint be dismissed.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (5 CFR 2423.29 (1982)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusion, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., August 31, 1982

James J. Shepard

James J. Shepard, Executive Director

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

VETERANS ADMINISTRATION MEDICAL CENTER
JOHN COCHRAN DIVISION
ST. LOUIS, MISSOURI

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 96

Charging Party

Case No. 7-CA-726

John J. Rubin, Esquire
For the General Counsel

Kenneth E. Reiter, Esquire
For the Respondent

Before: JOHN H. FENTON
Chief Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq., and the Rules and Regulations issued thereunder, Fed. Reg. Volume 45, No. 12, January 19, 1980, 5 C.F.R., Chapter XIV, Part 2411, et seq.

A charge was filed by Local 96, American Federation of Government Employees, AFL-CIO, on August 26, 1980, and an amended charge was filed on October 24, 1980. A Complaint and Notice of Hearing was issued on November 21, 1980 by the Regional Director, Kansas City Region, Federal

Labor Relations Authority, Kansas City, Missouri. The Complaint alleges three separate and distinct instances in which statements made by supervisors were violative of Section 7116(a)(1).

A formal hearing was held in St. Louis, Missouri on February 6, 1981. All parties were afforded full opportunity to examine witnesses, to introduce evidence, to make oral argument and to file briefs. Upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings, conclusions and recommended order:

The Union represents a unit of nonprofessional employees at this facility of over 2000 employees. A collective bargaining relationship has existed since at least 1973, and there is no suggestion, apart from the unfair labor practices alleged herein, that this long relationship has been other than amicable.

All three alleged violations have their source in a dispute between Johnnie Mae Hinton, a Housekeeping Aide and Althea McKenzie, Supervisor of the Operating Room, over the responsibility for disposal of linens used in surgery. McKenzie supervises the Nursing Staff, composed of Registered Nurses (excluded from the unit), Licensed Practical Nurses and Nursing Assistants. She has no supervisory authority over Hinton, who works for Building Management and reports directly to Shirley Hogue, Housekeeping Aide Foreman. The linens could be very heavy, and Hinton, a slight woman, resented the fact that male Nursing Assistants were not permitted to help her toss the bags down the laundry chute. McKenzie was apparently anxious to protect her turf, patient care, from the inroads of such distractions, and so a "jurisdictional" dispute developed. Hinton apparently filed grievances related to the matter (none of which is in evidence) during 1978, 1979, and in early 1980. In the last of these, it would appear, she sought either to compel McKenzie to provide help when needed or to transfer responsibility for clean-up in the operating room (OR) to the Nursing Staff.

It is clear that this controversy intensified in early 1980, again apparently because of staff shortages and an increased determination on McKenzie's part to prevent the assumption of housekeeping duties by her subordinates from interfering with patient care. The long and unresolved dispute resulted in bickering and dissension, and fueled, according to the General Counsel's witnesses, a personality clash between Hinton and McKenzie.

Little else is clear with respect to the evidence surrounding the Complaint's first allegation: that from February 27 to May 30, 1980, approximately twice a week McKenzie told her subordinates that the Union could not help Hinton, that it would not help her because she was a troublemaker and that it was not worth anything and could not do anything for employees. The OR nursing staff consists of about ten Registered Nurses, four Licensed Practice Nurses and eleven Nursing Assistants. Of these twenty-five potential witnesses, two were called by the General Counsel and one by Respondent. Never has the undersigned encountered such widely divergent views of what happened.

The General Counsel's two witnesses were Registered Nurses, claimed to be neutral observers because not in the unit, although one had received a reprimand from McKenzie and the other spoke to her annoyance that McKenzie continually involved the staff in what she regarded as "something personal between Ms. McKenzie and Ms. Hinton." The reprimanded nurse, who described that relationship as a personality clash, testified that every day, for many months, McKenzie told the entire nursing staff at the meetings held every weekday morning that she did not understand why Hinton took her problem to the Union, because the Union did not help her; that the Union considered Hinton a troublemaker because she was always taking problems to it; that the Union was "not about anything;" and that she did not know why the Union would go around saying it had brought about termination of the parking fee program when it had not done anything about it. The other Nurse testified that at least several times a week, from December, 1979 until May or June, McKenzie told those at the daily staff meetings that Hinton had filed a grievance against her; that she had gone to the Union and the Union wasn't going to help her or could not help her because it did not have any power; and that McKenzie had not done anything wrong and therefore nothing could be done to her. As an example of that powerlessness, she said, McKenzie said that the rumors that the Union deserved credit for ending the parking fees were untrue.

Head Nurse Sandra Sides testified that the staff complained about Hinton and the linen issue and that McKenzie told them that they would have to live with it, that she commented that Hinton had gone to the Union about the matter but said nothing derogatory about the Union. Licensed Practical Nurse Louis Loper, a Union member, testified that the linen issue was discussed at meetings but that McKenzie never said that the Union could not or would not help any employees, or anything else derogatory of, or belittling to, the Union. McKenzie testified that her relationship with Hinton had been strained for several years because of problems with Hinton's performance and threats that the Union was going to "get her." She acknowledged having said that she had not done anything for the Union to bother her about, and denied ever having said that the Union would not or could not help Hinton, or that it was not worth anything and could not do anything for employees. She admitted labeling Hinton as a troublemaker, but denied that it had to do with Hinton's Union activities or was tied to the Union's willingness to help her. She further admitted that she became aware, in March, that Hinton had grieved her alleged harassment of Hinton, which apparently referred to McKenzie's refusal to assign nursing service personnel to assist in disposing of linens and cleaning the OR.

Conclusions as to the First Allegation

Neither version of these staff meetings is credible. While neither the intent of the speaker nor the reaction of the listener is relevant in assessing statements under Section 7116(a)(1), I think it proper to consider such evidence in the effort to determine *what* was said, as opposed to determining the impact upon the "reasonable man" of a given utterance. For that reason I have given weight to the fact that the General Counsel's witnesses characterized McKenzie's dispute with Hinton as a personality clash and as "something personal" between those two. I think it is also significant that Counsel for the General Counsel, in closing argument, said he "was perfectly willing to agree . . . that Ms. McKenzie was not intending to disparage the Union, that she was not intending to do anything wrong, was not intending to discredit the Union . . . ." I am entirely satisfied that McKenzie did not regularly lecture her subordinates on the powerlessness of the Union as such.

It is clear that there was much discussion of the dispute with Hinton as it impacted on their work, and that the subject was a constant irritant and source of dissension. It is also clear that there were rumors that the Union was going to "get" McKenzie, that she felt she was being threatened, and that she told the staff, after the grievance was filed, that the Union could not do anything to her as she had not done anything wrong. I credit also the testimony that she said the Union would not assist Hinton, whom it regarded as a troublemaker, and that she also said something to the effect that the Union could not help Hinton in this particular struggle. I think that the message conveyed was that the grievance was meritless, i.e., the Union would not try or would not succeed in transferring OR clean-up duty from its housekeeping constituency to nursing constituency. As noted, who was to do such work was necessarily a common topic, and the resolution of the grievance might ultimately settle the matter. I credit the testimony that McKenzie said words to the effect that the Union "was not about anything," i.e., was not up to anything of any importance in this matter. I do not believe that she said that the Union was worthless or that it could not do anything for employees generally. Rather, I find that she was, in dismissing the likelihood that the grievance would be successful, making very specific reference to the contest with Hinton, and expressed her view that the Union would not, or could not, do anything about it. I also find that she told her staff that the rumors crediting the Union with having removed the parking fee were untrue. I do not believe she made such statements several times a week for three months, but find that such remarks were repeated.

The Authority has held[1] that "outside of a representational context, Section 7116(e) protects the expression of personal views, arguments or opinions by management . . . . as long as such expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions." Thus the doctrine of disparagement fashioned by the Assistant Secretary, and relied upon here by the General Counsel, has been largely destroyed. Supervisor McKenzie's statements that the Union could not or would not help Hinton in their controversy was devoid of any explicit threat or promise, and would constitute a violation only if the repitition and/or the place and manner of utterance created cocercive conditions. Clearly McKenzie could express her personal opinion that the grievance or complaint of Hinton was groundless or that the Union either would not or could not do anything about the allocation of tasks either to the nursing staff or the housekeeping staff. The rationale of the Tinker case applies to permit such observations where made by a supervisor to employees who had initiated the conversation. Query whether the privilege is lost when the statement is made at staff meetings, or whether the reference to "coercive conditions" imports the existence of other violations of law, or an utterance made with such vehemence or hostility as to be intimidating.

It has been noted that the legislative history is not a model of clarity. Clearly, Senator Hatch, as sponsor of the so-called free speech amendment, desired to afford government managers the right, "speaking personally . . . to . . . say that he does not like unions, and he does not think they are a very good idea and he does not think they will do anybody who joins them any good." (Legislative History, pages 1025-1026). In Department of the Air Force, 5 FLRA No. 62, the Authority noted, in a representational context, that the Commander's expression of his opposition to the union was not communication of a "personal view, argument (or) opinion," but rather could "reasonably be viewed as the Activity's official position" where the message was posted on all bulletin boards and circulated to unit employees. While I am not clear on the relevance of breadth of dissemination in an election context, where a posture of neutrality is required, the Authority has held that the source and method of a communication are significant factors in the assessment to be made.

There is no indication here that McKenzie expressed the VA Hospital's official position that this Union could not or would not do anything for employees at large. Rather I have found that she spoke to this particular problem in the OR. There is no evidence that she spoke in anger or otherwise conveyed a hostility toward the bargaining agent which would be threatening to employees. At most, she indicated disdain for the role the Union might play in her running battle with Hinton. The only ground, then, in which her statements could be violative, would be that they were made to the entire nursing staff at meetings, and were repeated, and were not idle, offhand and thus more clearly "personal" expression of views. In no other respect were conditions coercive, there being no other violations, or even indications of hostility to the Union in this large facility. Thus a finding of a violation would be predicated on the notion that such statements, at staff meetings, are per se unlawful.

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[1] Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma, 6 FLRA No. 32. Cf. Department of the Army, Ft. Bragg Schools, 3 FLRA No. 57.

I conclude that such statements, made in this general labor relations environment, and with reference to this particular grievance, are protected free speech, in which an individual supervisor told her subordinates that, in her judgement, the Union had no interest in, and no power to alter, the institutional arrangements for OR clean-up. While such remarks may have put down, disparaged or demeaned the Union, that is precisely what the free speech amendment would seem to permit.[2]

The second allegation, in time, is that McKenzie, in the presence of unit employees, referred to a Union Steward as "a big bad Union Steward who reported to OR to represent Hinton, but had ultimately assisted her in disposing of the work related matters concerning which he had been asked to serve as the bargaining unit employee's Union representative."

On April 14, OR was very busy, leaving about a dozen very heavy bags of soiled linens to be tossed down the laundry chute. Housekeeping Aid Walter O'Hara had gone for the day, leaving Hinton alone to dispose of the linens. She asked McKenzie and Head Nurse Sides for, and was refused, the assistance of the nursing staff. She then placed calls her supervisor, Shirley Hogue and to Union Steward Gregory Mitchell. Hogue unsuccessfully asked McKenzie to provide nursing staff assistance, and then called her supervisor, the Building Manager, who told her to secure another housekeeping aide. As Hogue passed this information to Hinton, Gregory arrived, overheard what was said, and volunteered to help Hinton. (It happened that Mitchell worked for Building Management as a housekeeping aide elsewhere in the hospital). While Mitchell helped Hinton dipose of the dirty linens, McKenzie and Head Nurse Sides were talking to one another and smiling as they watched. At this point, McKenzie allegedly made the statement set forth in the Complaint.

Three witnesses provided most tenuous support for the allegation that such a statement was ever made. The alleged witness to the statement was Union Vice-President Bobo. No witness to the incident places Bobo as present during the dirty linen incident except Head Nurse Sides, who said Bobo was not there during her conversation with McKenzie in the presence of Union Steward Mitchell. McKenzie testified that she thought Bobo was present. General Counsel's two witnesses report conversations with Bobo later that afternoon which are proferred as competent evidence under the spontaneous or excited utterance exception to the hearsay rule. Thus Hinton testified that about thirty minutes after the incident, Bobo told her that either McKenzie or Sides had told him that the "big bad steward . . . had come up to resolve the problem of throwing the linen and ended up throwing the linen himself." However, just before this conversation, Hinton had gone to see supervisor Hogue about the incident and reported that Hogue told her that Bobo had come to her to find out what had happened at the OR. While all of this is hearsay, it does create doubt as to the source of the information Bobo passed on to Hinton. Steward Mitchell reported that, about thirty minutes after the incident, Bobo told him that he had heard what had happened at the OR - that McKenzie had made the statement described by Hinton. When asked on direct examination whether Bobo told him who he had heard say that, Mitchell replied that Bobo said that McKenzie said it. On cross-examination Mitchell testified that Bobo did not tell him how he knew about the statement and did not say that he heard it. As already noted, Mitchell did not name Bobo as being present during the incident. Supervisor Hogue, who said she did not hear either McKenzie or Sides make the alleged statement, testified that she heard of it from Bobo. Bobo reportedly said that "someone had made a statement that Gregory Mitchell, a Union steward . . . . had to wind up throwing the linen down the chute." Hogue further testified that Bobo said he heard the statement but "he did not tell me who said it." When asked whether Bobo told her who he heard say it, she replied that he had not. Finally, Bobo was not called because he cannot recall anything whatever about the incident.

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[2] Cf. Army and Air Force Exchange Service, Ft. Carson, Colorado, OALJ-82-24 and OALJ-82-30.

Conclusions as to the Second Allegation

Section 2423.17 provides that the parties to unfair labor practice proceedings shall not be bound by the rules of evidence. Thus none of the obvious hearsay recounted above was excluded from the record. Nevertheless the effort was quite naturally made to add to the probative value of such evidence by attempting to bring the statement attributed to Bobo within the spontaneous or excited utterance exception to the traditional hearsay exclusionary rule. Conventional application of this rule would permit findings to be made based on a statement uttered by a missing witness - one who cannot be put to the test of cross-examination - on the ground that the exciting circumstances in which the statement was made and the lack of any opportunity to reflect and, perhaps, to prevaricate, tends to guarantee the truthfulness of the statement.

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Here, it would hardly seems that the circumstances were so exciting, or the time interval so brief, as to afford any real assurance that Bobo was reflexively passing on a significant and unvarnished truth. Worse, only one witness said that Bobo had heard McKenzie make any such remark (to him), and that witness testified that she was told that Bobo had been to see her supervisor to find out what happened in the OR. Nobody else, in fact knows where Bobo picked up such knowledge, and Bobo himself is an "unvailable" witness only because he, a top Union official presumed to have a special interest in such matters, has no recollection of the event. On the shaky assumption that Bobo did not pick up second or third hand the "knowledge" he passed on to Hinton, Mitchell and Hogue, then he is the only person this record suggests may have heard such a statement.

While the rules of evidence are not binding, no fair hearing process can permit a finding of even a prima facie case of a violation of law, based solely on hearsay evidence (or double hearsay). Having observed at the hearing that this was a "very very tenuous case" and that I was not inclined to accept "virtually naked" hearsay devoid of any strong surrounding corroborative circumstances, I grant Respondent's motion to dismiss this allegation.

The final allegation is that, between June 9 and June 20, Dr. William T. Newton, Chief of Surgery, told Johnnie Mae Hinton that "had she come to him first with regard to a problem . . . rather than seek assistance from the Union, he could perhaps have helped her with her problem, but that since she elected to seek Union assistance, matters had gone too far for him to assist her."

The only witness to this incident is Hinton, as Dr. Newton is deceased. Her story is as follows. She went to see Newton because of rumors that the housekeeping aides were going to be removed from surgery. Dr. Newton told her that the issue was over throwing linen bags, that she as a woman was unable to throw the bags and he was going to get two male nursing assistants to do it. He added that "had I come to him earlier, before I had gone to the Union and created all of this problem, that he probably could have helped the situation, but that it was easier for him to dispose of the two housekeeping aides than it was to get rid of Ms. McKenzie." During the conversation of about one-half hour, Dr. Newton elaborated, stating that he could have bought a lift to put the bags up to the chute. He was pleasant throughout their talk.

This entire matter is puzzling, because the resolution of the dirty linen matter appears to have been a victory for Hinton. She admitted that she won her fight with respect to her contention that linen disposal was not housekeeping's job, but said she did not win her fight because she lost her job in OR as a result of that. It appears that she wished to keep all OR "clean-up" responsibilities except for lifting the bags and tossing them down the laundry chute, and that she (and O'Hara) lost other associated duties in surgery, although that is hardly clear. She attributes to Dr. Newton the decision to use male nursing assistants for linen disposal - exactly what she herself said she wanted. I make the effort to explore these matters because I believe it important to understand the context in which the words attributed to Dr. Newton - or something like them - were used. Simply plucking out, and presenting in isolation someone's recollection of a conversation, represents only half the inquiry, for it is a commonplace observation that words take on meaning from the entire context in which they are used. People are far more likely to recall an impression received than the very words employed, and I have already indicated my doubts about the accuracy of Hinton's recall about the Bobo incident. She was a truthful witness, but was the only one who quoted Bobo as having said that he directly heard McKenzie say anything about a "big bad" steward, and the whole sense of this record is that he did not, but that she misunderstood. I find troublesome, too, Hinton's testimony that Dr. Newton said it was "easier . . . to dispose of two housekeeping aides than to get rid of McKenzie." On this record it is difficult to imagine any such conflict, for it was McKenzie who insisted that the aides, and not her nursing staff should dipose of the linens.

This record does not establish what happened to OR clean-up procedures, nor does it indicate who made that decision. We know only that a grievance was filed, that Hinton resented McKenzie's refusal to provide help in linen disposal, and that that function was assigned to the nursing staff, where Hinton argued it belonged. It also appears that she lost other, associated work which she did not seek to unload. I credit her assertion that, in Dr. Newton's effort to explain what had happened, he said something to the effect that had she come to him with her complaint before she made a formal grievance out of it, and involved the Union, arrangement might have been made to provide a lift which would pick up the linens to the level of the laundry chute. I further believe that he told her that the dispute had now reached a level where that resolution was no longer possible. While I do not believe that he said the remaining available options were to get rid of McKenzie or get rid of housekeeping aides - as remote a prospect as this record could suggest - I think he did indicate that the grievance had now reached a point where his proposed solution was no longer possible (i.e., in the Complaints' language, that matters had gone too far for him to assist her). The implicit contention that a lift might have been provided upon a request free of the taint of Union involvement, and would now be denied because of the Union's grievance role, is surely far-fetched. So far as we know she never sought a lift and would not have been happy with one. She, again, insisted all along that the job was not her responsibility but was Nursing's. According to her, there had existed for a long time a memo placing such responsibility there. It would certainly appear that a high-level decision was made, in response to her grievance, to fix that responsibility on McKenzie. Thus, I find that Dr. Newton did mention the Union, said that he might at an earlier stage have had a solution to the problem, but that now the matter had gone too far and he was powerless. Where one believes, as I do, that the circumstances argue powerfully against the precise statement attributed to Respondent's spokesman, it is perhaps permissible to note Hinton's subjective reaction. She testified that she did not feel that Dr. Newton was trying to interfere with her rights as a Union member or to punish her for seeking Union assistance, and that she was not thereafter reluctant to seek the Union's assistance.

In sum, I find that Dr. Newton, over the course of their thirty minute talk, told Hinton that he might have provided a lift had his help been sought early on, but that resolution of the grievance which she brought with the Union's help had reached a stage where he could no longer do that. That stage was communicated to her: a decision (consonant with her desire) to replace her with male nursing assistants who could lift the heavy linens, and a disposition on his part not to engage in any further dispute with McKenzie over the remaining clean-up duties of which Hinton felt deprived. I cannot, on this record, find that Dr. Newton said that his unwillingness or inability to provide Hinton with a mechanical lift she never asked for was the consequence of her exercise of the right to seek the Union's assistance in her effort to avoid the very task of lifting the linens.

Having found that the allegations of the Complaint are not supported by a preponderance of the evidence, I recommend that the Federal Labor Relations Authority enter the following order:

ORDER

IT IS HEREBY ORDERED that the Complaint herein be, and it hereby is, dismissed.

John H Fenton

JOHN H. FENTON
Chief Administrative Law Judge

Dated: April 27, 1982
Washington, D.C.

[9-CA-931; 9-CA-1100]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

CALIFORNIA NATIONAL GUARD,
SACRAMENTO, CALIFORNIA

(Respondent)

and

Case Nos. 9-CA-931
9-CA-1100

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (5 CFR 2423.29 (1982)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusion, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., August 31, 1982

James J. Shepard

James J. Shepard, Executive Director

[9-CA-931; 9-CA-1100]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

CALIFORNIA NATIONAL GUARD
SACRAMENTO, CALIFORNIA

Respondent

and

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

Case No.: 9-CA-931
9-CA-1100

Stuart Brody, Esq.
For the Respondent

Mary Dryovage, Esq.
For the General Counsel

Frank F. Benites
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on May 28, 1981 in Case No. 9-CA-931, and an amended Complaint and Notice of Hearing issued on July 31, 1981 in Case No. 9-CA-1100, by the Regional Director for the Federal Labor Relations Authority, San Francisco, California region, a hearing was held before the undersigned on August 10, 1981 at San Francisco, California.[1]

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[1] Case Nos. 9-CA-931 and 9-CA-1100 were consolidated by an order issued on August 3, 1981 by the said Regional Director.

This proceeding arose under the Federal Service Labor-Management Relations Statute (herein called the Statute or Act). It was based on a charge filed in Case No. 9-CA-931 by National Association of Government Employees, Local R12-125, and upon a charge filed in Case No. 9-CA-1100 by National Association of Government Employees (herein called NAGE or the Union), against the National Guard, State of California (herein called Respondent).[2]

The Complaint in Case No. 9-CA-931 alleged, in substance, that since on or about February 8, 1981, Respondent has failed and refused to grant travel and per diem expenses to an "employer[3]-union representative" concerning his participation in collective bargaining negotiations with the Respondent in violation of Sections 7116(a)(1) and (8) of the Act. The Amended Complaint in Case No. 9-CA-1100 alleged, in substance, that since on or about June 11, 1981 Respondent has failed and refused to grant travel and per diem expenses to union representatives Joseph Pasqual, Thomas Gentile, Harold Carpenter, and Roger Godt concerning their participation in collective bargaining negotiations with Respondent in violation of Sections 7116(a)(1) and (8) of the Act.

In its answer, dated July 21, 1981, to the Complaint in Case No. 9-CA-931, Respondent denied the essential allegation of the complaint and the commission of any unfair labor practices. In its answer,[4] dated August 17, 1981, to the Amended Complaint in Case No. 9-CA-1100, Respondent denied the commission of any unfair labor practice; and it alleged that no requirement existed under the Statute to pay travel or per diem expenses to union officials involved in collective bargaining negotiations. Said answer set forth, as an affirmative defense, that public funds appropriated to Respondent are designated by Congress and the California legislature for specific purposes regarding defense and preparedness; that spending monies for purposes outside categories authorized by legislatures would violate Federal and State constitutions.

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[2] Although it was referred to as National Guard Bureau, National Guard State of California, Sacramento, California in the Complaints in both cases, Respondent's correct title, as declared in the answer in 9-CA-931, is California National Guard, Sacramento, California.

[3] At the hearing the term "employer" was amended to read "employee".

[4] Respondent submitted its answer to the Amended Complaint in Case No. 9-CA-1100 at the hearing. The General Counsel did not object to the submission and the document was accepted and received in evidence as Respondent's Exhibit 1.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed with the undersigned which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. The California National Guard (Respondent herein) is a state agency which administers the federal technician programs. Prime responsibility therefor is rested in the Adjutant General of the state, although the technicians in the California National Guard are federal employees.

2. At all times material herein the National Association of Government Employees, AFL-CIO (Union herein) has been, and still is, the exclusive bargaining representative in eight National Guard units of technicians throughout the state of California. It represents in appropriate units the employees who are involved in these proceedings.

3. For some time Respondent has established a Technicians Personnel Manual (TPM) which provides guidance on personnel matters affecting technicians. The TPM sets out personnel policies, practices and other matters affecting conditions of employment. It deals with such items as sick leave, annual leave, and grievances of the technicians.

4. Prior to February 24, 1981 Respondent republished the TPM as an updated version of the manual. Upon request by the Union, the Respondent agreed to meet with the bargaining representation and discuss the provisions wiht a view toward clarifying some of them, or possibly making necessary changes.

5. In order to establish ground rules for negotiations concerning the TPM, Respondent and the Union met in Fresno, California at the Fresno Air National Guard Base on February 24, 1981. In addition to several non-employee individuals, the Union was represented by Joseph Pasqual, Harold Carpenter, Thomas Gentile, Richard Lloyd and David Kaiser - all unit employees representing the eight local National Guard employees. The representatives of both parties met on the aforesaid date for about two hours. Ground rules for the forthcoming negotiations regarding the TPM were agreed upon and reduced to writing in a document entitled "NEGOTIATING SESSION GROUND RULES".[5] It included such topics as Negotiating

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[5] General Counsel's Exhibit 2.

Submission of Proposals, Impasse in Negotiations and Maintenance of Records. The agreed upon dates for the bargaining sessions regarding TPM were June 9, 10, 11.

6. All of the Union representatives who were employees, with the exception of Joseph Pasqual, resided in Fresno at the time of the meeting on February 24. Pasqual, who was president of Local R12-125[6], NAGE, resided in San Diego, California. He departed from home on February 23 and travelled approximately 400 miles to attend the meeting. Pasqual returned to San Diego on February 25 after participating in the "ground rules" session on the previous day as the representative of his Local union.

7. All of the employees who attended the February 24 meeting in Fresno were granted official time by Respondent. Although he requested travel expenses and per diem for his trip from San Diego to Fresno, Pasqual was denied said request, and Respondent has refused to pay travel and per diem expenses to said union representative. The denial was based on the contention that Pasqual was not performing official duties by attending the meeting; that the employee, as a union representative, was performing union business for which he was accorded official time.

8. On June 9, as scheduled, the parties met at San Luis Obispo, California to negotiate the republished TPM and discuss any proposed changes thereto. Under the ground rules the Union team was limited to five members, of which not more than four technicians were permitted to attend the meeting. In accordance therewith, the Union appointed as representatives the following four technicians[7]: Joseph Pasqual, heretofore mentioned; Harold Carpenter, President of Local R12-105; Thomas Gentile, Presidnet of Local R12-132; and Roger Godt, President of Local R12-150.

9. Record facts show that the aforesaid four technicians traveled on June 8 in private cars from their homes to San Luis Obispo in order to attend the negotiations scheduled to commerce on June 9. Pasqual drove about 400 miles from San Diego to San Luis Obispo; Carpenter and Gentile each traveled about 180 miles from Fresno to San Luis Obispo; and Roger Godt drove about 200 miled from Hayward to San Luis Obispo.

6/ This local comprised all technicians in the California National Guard not covered by other local unions.

7/ Frank Benites, NAGE representative, also attended as union representative.

10. Management was represented by five officers, and this team met at 9:00 a.m. on June 9 with the five Union representatives to discuss the TPM. The meeting on the first day lasted until 2:00 p.m. The parties resumed negotiations on June 10 at 9:00 a.m. and continued until 4:00 p.m. Negotiations[8] were completed on June 11, and the representatives met from 8:00 a.m. until 1:00 p.m.

11. Prior to the TPM negotiations on June 9 all four technicians requested compensation for travel as well as per diem expenses, for the trip from their homes to and from San Luis Obispo to attend the bargaining sessions. Respondent refused those requests but did grant the individuals official time therefor. At the close of the negotiations Lieutenant Colonel Miller, management's representative, declared that Respondent wouldn't pay such travel and per diem expenses to the four technicians who appeared as Union representatives.

Conclusions

The principal issue for determination herein is whether, under Section 7131(a) of the Act, employees are entitled to travel and per diem expenses while acting as union representatives on official time during bargaining negotiations. General Counsel adverts to the Authority's Interpretation and Guidance, 2 FLRA 265 (1979), wherein it interpreted Section 7131(a) of the Statute as requiring payment for expenses so incurred. Further, cases decided by the Authority, as well as numerous decisions by various administrative law judges, are cited in support of the allegations in the case at bar.

Respondent takes the position that no basis exists for construing Section 7131(a) as mandating the payment of travel and per diem expenses to union agents under these circumstances. It contends that the Authority's Interpretation and Guidance, heretofore mentioned, is not a valid regulation since it was not issued pursuant to the Administrative Procedure Act; and that the Authority, in announcing the rule, exceeded its authority since only the Administrator of General Services has the right to determine which employees may receive such monies. Respondent also insists that the Authority's determination in this regard runs counter to declarations by the Comptroller General, 44 Comp. Gen. 617 (1965), as well as standards set by the Civil Service Commission. It argues that no basis exists under Title VII for the Authority's decisions allowing such payments. The Respondent further insists the Authority thus interferes with the agency's prerogative to determine its own budget under Section 7106 of the Act, since the agency would be required to set aside funds for this purpose.

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[8] It is conceded by Respondent, as testified by Lt. Colonel Mahoney, that collective bargaining did occur during the June meetings with respect to the TPM.

While the arguments by Respondent are cogently articulated, the issue at bar has been seemingly resolved by recent decisions. Thus, in Bureau of Alcohol, Tobacco and Firearms, Western Region, Department of the Treasury, San Francisco, California, 4 FLRA No. 40 it was held that the union representative was entitled to be paid travel and per diem expenses incurred, as well as allowed official time, for having participated in negotiations of a collective bargaining agreement betweent he union and the agency. In affirming the Federal Labor Relations Authority's decision, the United States Court of Appeals, 9th Circuit, (No. 80-7673, 81-7021, filed March 22, 1982) concluded that the Authority's Interpretation of Section 7131(a) of the Act was reasonable and supportable even though it might not have the force of law. The Court concluded that the Statute's reference to negotiations of a collective bargaining agreement encompasses all situations in which agency and union representative meet to negotiate conditions of employment. Further, it sustained the Authority's view that the union representatives, who are engaged in such negotiations, are entitled under 7131(a) to be paid travel and per diem expenses incurred in connection therewith. The Court commented that such payment resulted in equating the position of union representatives with that of management representatives who are uniformly paid travel and per diem expenses.

In the case at bar reimbursement is sought for travel and per diem expenses incurred by the union president, Joseph A. Pasqual, for attending the negotiating session on February 24, 1981 in Fresno, California, as well as the said expenses incurred by him and the other union representatives, Harold Carpenter, Thomas Gentile, and Roger Godt for attending the negotiations on June 9, 10, and 11, 1981, at San Luis Obispo, California. While the meeting on February 24 at Fresno involved negotiations regarding the ground rules for the forthcoming bargaining sessions in June, I conclude that such negotiations are encompassed within the language of Section 7131(a) regarding collective bargaining negotiations. Discussions regarding rules which will operate as a framework for negotiations are, in my opinion, part and parcel of the collective bargaining process. Thus, I conclude that, in addition to reimbursing the union agents for travel expenses and per diem in connection with the bargaining sessions held between June 9-11, 1981, Respondent should reimburse union president Pasqual for travel and per diem related to the meeting held on February 24, 1981.

Since it is now established[9] in the public sector that, under Section 7131(a) of the Act, employees who act as union negotiators are entitled to be paid for travel and per diem expenses while engaged in collective bargaining, I conclude Respondent has run afoul of the Statute by refusing to make such payments. Its failure in this regard constitutes a violation of Sections 7116(a)(1) and (8) of the Act.

Having found that Respondent committed such violations, I recommend the Authority adopt the following order:

ORDER

Pursuant to Section 7118(a)(7) of the Federal Service Labor-Management Relations Statute and Section 2423.29 of the Rules and Regulations, it is hereby ORDERED that the California National Guard, Sacramento, California, shall:

1. Cease and desist from:

(a) Failing and refusing, as required by Section 7131(a) of the Statute to provide payment of properly documented travel and per diem expenses incurred by Joseph A. Pasqual, Harold Carpenter, Thomas Gentile, and Roger Godt, or any other of its employees, as a result of their participation, on official time, as duly designated representatives of National Association of Government Employees, AFL-CIO, the exclusive representative of the bargaining unit employees, in scheduled Union-Agency negotiating sessions.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Provide payment to Joseph A. Pasqual in reimbursement of the properly documented claims he has submitted for payment of his travel and per diem expenses he has incurred as a result of his participation, on official time, as a duly designated representative of the above union, in Union-Agency negotiating sessions on February 24, 1981 at Fresno, California, and between June 9-11, 1981 at San Luis Obispo, California.

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[9] The Authority has adhered to its view that travel and per diem expenses are properly due, under Section 7131 of the Act, when employees represent the exclusive representative in collective bargaining negotiations. See U.S. Department of Agriculture, Science and Education Administration Agricultural Research, North Central Region 6 FLRA No. 45.

(b) Provide payment to Harold Carpenter, Thomas Gentile, and Roger Godt in reimbursement of the properly documented claims they have submitted for payment of their travel and per diem expenses they have incurred as a result of their participation, on official time, as duly designated representatives of the above union, in Union-Agency negotiating sessions between June 9-11, 1981 at San Luis Obispo, California.

(c) Post at its facilities at Sacramento, California, copies of the attached notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Commander of the California National Guard, Sacramento, California, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Commander shall take reasonable steps to insure that said notices are not altered, defered or covered by any other material.

(d) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region IX, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

William Naimark

WILLIAM NAIMARK
Administrative Law Judge

Dated: April 14, 1982
Washington, D.C.

[9-CA-931; 9-CA-1100]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

We Hereby Notify Our Employees That:

WE WILL NOT fail or refuse to provide payment of properly documented travel and per diem expenses incurred by Joseph A. Pasqual, Harold Carpenter, Thomas Gentile, and Roger Godt, or any other of our employees, as a result of their participation, on official time, as duly designated representatives of National Association of Government Employees, AFL-CIO, the exclusive representative of the bargaining unit employees, in scheduled Union-Agency negotiating sessions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL provide payment to Joseph A. Pasqual in reimbursement of the properly documented claims he has submitted to us for payment of his travel and per diem expenses he has incurred as a result of his participation, on official time, as a duly designated representative of the above union, in Union-Agency negotiating sessions on February 24, 1981 at Fresno, California, and between June 9-11, 1981 at San Luis Obispo, California.

WE WILL provide payment to Harold Carpenter, Thomas Gentile, and Roger Godt in reimbursement of the properly documented claims each has submitted to us for payment of his travel and per diem expenses he has incurred as a result of his participation, on official time, as a duly designated representative of the above union, in Union-Agency negotiating sessions on February 24, 1981 at Fresno, California, and between June 9-11, 1981 at San Luis Obispo, California.

____
(Agency or Activity)

Dated: ____________________ BY: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 9, whose address is: 530 Bush Street, Suite 542, San Francisco, California, 94108, and whose telephone number is: (415) 556-8105.

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Federal Labor Relations Authority

Washington, D.C. 20424

Number 15

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

September 17, 1982

UNFAIR LABOR PRACTICE CASES

Case Nos. 5-CA-985 and 5-CA-1015 (September 2, 1982)

Department of the Treasury, Internal Revenue Service, and Internal Revenue Service, Indianapolis District and National Treasury Employees Union, and National Treasury Employees Union, Chapter 49

Case No. 8-CA-20006 (September 2, 1982)

Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, AFL-CIO

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* This report series includes decisions and orders of FLRA adminsitrative law judges to which no exceptions were filed with the Authority within the prescribed time limit. In accordance with section 2423.29(a) of the Authority's rules and regulations, as amended (46 Fed. Reg. 40674 (1981)), the findings, conclusions, and recommendations in such ALJ decisions constitute, without precedential significance, findings, conclusions, decisions and orders of the Authority.

Y 3.F 31/21-3:

[5-CA-985; 5-CA-1015]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, AND
INTERNAL REVENUE SERVICE,
INDIANAPOLIS DISTRICT

(Respondent)

and

Case Nos. 5-CA-985
5-CA-1015

NATIONAL TREASURY EMPLOYEES
UNION, AND NATIONAL TREASURY
EMPLOYEES UNION, CHAPTER 49

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled cases on July 23, 1982, in which he found that the Respondent had not engaged in an unfair labor practice as alleged in Case No. 5-CA-985, and recommended that the complaint be dismissed. The Administrative Law Judge further found that the Respondent had engaged in an unfair labor practice as alleged in Case No. 5-CA-1015, and recommended the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the decision have been filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (5 CFR 2423.29 (1982)), the findings, conclusions, and recommendations in the decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint in Case No. 5-CA-985 is hereby dismissed. In Case No. 5-CA-1015 the Respondent shall cease and desist from the violation and take the affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., September 2, 1982

James J. Shepard

James J. Shepard, Executive Director

[5-CA-985; 5-CA-1015]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, AND
INTERNAL REVENUE SERVICE,
INDIANAPOLIS DISTRICT

Respondent

and

NATIONAL TREASURY EMPLOYEES
UNION, AND NATIONAL TREASURY
EMPLOYEES UNION, CHAPTER 49

Charging Party

Case Nos. 5-CA-985
5-CA-1015

John Freeman, Esq.
James E. Kagy, Esq.
For Respondent

Joseph V. Kaplan, Esq.
For Charging Party

Claire Morrison, Esq.
For General Counsel, FLRA

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §7101, et seq., 92 Stat. 1191 (hereinafter referred to as the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, §2410 et seq.

A charge was filed on March 13, 1981 in Case No. 5-CA-985, by the National Treasury Employees Union and National Treasury Employees Union, Chapter 49 (hereinafter called the Union or NTEU), against the Internal Revenue Service and Internal Revenue Service, Indianapolis District (hereinafter called Respondent or IRS), alleging that IRS violated Section 7116(a)(1) and (2) of the Statute by unlawfully discriminating against Walter Barcus. A charge was filed on March 25, 1981 in Case No. 5-CA-1015 by NTEU against IRS alleging that Respondent violated Section 7116(a)(1), (5), and (8) of the Statute by refusing to supply the Union with certain information as required by Section 7114 of the Statute.

On June 30, 1981 a Complaint and Notice of Hearing was issued in Case No. 5-CA-985 and on July 24, 1981 a Complaint and Notice of Hearing was issued in Case No. 5-CA-1015. On July 24, 1981 an Order Consolidating cases was issued in Case Nos. 5-CA-985 and 5-CA-1015 for the purpose of hearing. Respondent filed answers in these two matters denying that it had committed the alleged unfair labor practices.

A hearing was conducted before the undersigned in Indianapolis, Indiana. IRS, NTEU, and General Counsel of the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. All parties filed post hearing briefs which have been fully considered.

Based upon the entire record in this matter, my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following:

Findings of Fact

On January 31, 1977 IRS entered into a collective bargaining agreement with NTEU wherein Respondent recognized the Union as the collective bargaining representative for a unit including IRS' professional and nonprofessional employees located in the IRS' Indianapolis District Office, with certain exceptions not here relevant. A new collective bargaining agreement covering the same unit was entered into on January 26, 1981 which expires January 26, 1985. At all times material herein NTEU Chapter 49 has been the agent for and acting on behalf of NTEU.

A. Case No. 5-CA-985

At all times material herein Walter Barcus has been an Internal Revenue Agent employed in IRS' Indianapolis District. Barcus has been an Internal Revenue Agent for about 16 years, the last 10 or 11 at the GS-11 level. Since 1972 he has also served as a Steward for NTEU Chapter 49 in the Lafayette, Indiana office.

Prior to March 17, 1980 Barcus had received annual appraisals on his anniversary of employment with IRS and his performance was consistently rated as satisfactory, although in 1978 Barcus received from his supervisor an individual development plan which noted certain areas that needed improvement. Barcus' supervisors reviewed about 25 percent of his cases. The case evaluations were generally one or two pages long, were given to Barcus within a day or two of when the cases were submitted for review, and generally rated the quality of Barcus' work from good to very good.

On March 15, 1980 John Hunter became the Lafayette Indiana Group Manager and thus Barcus' immediate supervisor. During 1980 Barcus filed four or five grievances, one or two on behalf of himself, one on behalf of fellow revenue agent William Lutgen and two on behalf of fellow revenue agent Tere Mynatt. Both Mynatt and Lutgen are in Barcus' work group under Hunter's supervision. These grievances were either heard by or involved Hunter and no grievances were filed by other employees. The grievance on Lutgen's behalf apparently dealt with the granting of administrative leave during a blizzard and was filed soon after Hunter became Group Manager. One of the grievances involving Mynatt involved Hunter's decision to withhold Mynatt's within grade increase because of work performance deficiency. This grievance was filed, in June or July 1980. After the first step procedure, Hunter granted Mynatt a within grade step wage increase and, because of work improvement, Hunter recommended Mynatt be promoted to a grade GS-11 in 1981.

During the latter part of 1979 Richard Oser, who had been recently appointed Branch Chief over the Lafayette, Indiana group manager, went to Lafayette to investigate the expiration of the statute of limitations in a case handled by Lafayette group.[1/] Before going to Lafayette, Oser reviewed reports that are rountinely submitted to him and identified old cases to examine in order to determine whether they had been adequately protected from expiration of the statute of limitations. One of the cases Oser selected for review was one that had been assigned to Barcus. The case caused Oser concern because of the large amount of time, 100 hours, Barcus had devoted to it before the review and Barcus' determination, after that expenditure of time, to use a different approach in examination of the return. Further, during the visit Oser observed that Barcus and Mynatt, who had been assigned the development of tax protestor cases, a high priority area, had not followed through on their task. Oser met Hunter, when Hunter was on his way to take over as Lafayette group manager and Oser expressed his concern at the way cases were being handled, at the over age cases and at the fact that tax protestor cases weren't being processed. Oser mentioned Barcus as having a number of relatively old cases.

Shortly after arriving in Lafayette on March 17, 1980 Hunter

[1/] The expiration of the statute of limitations prevents the assessment of tax and is considered a serious matter within IRS. Both the revenue agent and the group manager are held responsible for such an occurrence and are liable to be disciplined.

conducted a review of one of Barcus' cases. Hunter decided that Barcus' processing of this case was unsatisfactory. Hunter continued to review Barcus' work throughout the remainder of 1980 and thus confirmed Hunter's initial feeling that Barcus' job performance was deficient. Hunter determined that Barcus was either unable or unwilling to use his time effectively and to apply proper examination techniques. Hunter met with Barcus often and advised him of his job performance shortcomings and what aspects needed improvement. In Hunter's view Barcus' work performance did not improve. Hunter determined that Barcus' job performance was unacceptably deficient and advised Barcus that Barcus' annual performance rating due on September 10, 1980 would be postponed because of Barcus' deficient work performance. Hunter devised a self-development plan for Barcus so that Barcus could correct performance deficiencies.

Barcus' work performance did not improve and on January 15, 1981 Hunter prepared a letter warning Barcus that improvement in his performance would be required within 60 days. This 60-day letter was given to Barcus on February 5, 1981. Barcus' work was thereafter reviewed on a biweekly basis and Hunter concluded the deficiences in Barcus' performance continued. Accordingly, Hunter recommended that adverse action be proposed and a Notice of Proposed Adverse Action was issued to Barcus on May 29, 1981, by James L. Frank, Chief of IRS' Examination Division.

Upon becoming group manager on March 17, 1980 Hunter reviewed 80 to 90 percent of Barcus' cases and prepared evaluations that were 20 to 40 pages in length and were almost totally negative with respect to Barcus' work.[2] With respect to other employees Hunter evaluated 80-90 percent of the work of some employees and about 25-40 percent of others,[3] his evaluations were very lengthy and, in a number of instances, in addition to Barcus, Mynatt and Lutgen, Hunter's evaluation were negative and highly critical. Hunter also performed many workload reviews of the employees under his supervision.

During January 1981 Hunter advised Barcus, the Union Shop Steward, that Hunter wished to make some minor changes in the way the furniture was arranged. Barcus indicated he had no objection and suggested some changes he wished made, apparently to give himself some additional telephone privacy. The furniture was then moved. Hunter was then instructed by Oser to replace the furniture in its prior position because the NTEU had not been properly notified. The furniture was accordingly restored to its prior position.

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[2] There is some dispute how long it took Hunter to prepare the case evaluation. Barcus contends it took Hunter up to 60 days, Hunter contends he normally completed them in a day or two, no longer than a week. In any event the record does not establish that Hunter's evaluation of Barcus' cases took any longer than Hunter's evaluations of the work of the other employees.

[3] This apparently was somewhat related to case output. Hunter reviewed a greater percentage of the cases of employees who put out fewer cases and a greater percentage of the cases of those employees whose work he found deficient.

During May of 1980 Hunter, during the course of a staff conference advised his staff that he did not believe that they were entitled to work breaks but that if they had been taking work breaks, they would continue as long as they did not abuse it. Employees then asked if they could add break time to their alloted lunch time if they did not take breaks. Hunter replied in the negative.[4] During January 1981 Hunter, while cleaning out files, came upon a document issued by the Indianapolis District which stated that employees were entitled to breaks. Hunter discussed the matter and the document with his labor relations office and then issued a memorandum advising the employees that they are in fact entitled to breaks.

B. Case No. 5-CA-1015

By letter dated February 20, 1981 NTEU Chapter 49 President Gene Friedman requested that Respondent's Chief of the Resources Management Division, Dean R. Brown, furnish the Union, "pursuant to rights under 5 U.S.C. 7114(b)(4)(B) and under the Freedom of Information Act . . .", copies of monthly reports, case evaluations, workload reviews and planning calendars, for the period of March 1980 to February 20, 1981, of all employees in group 1213, the group to which Barcus was a member.

Sometime early in March 1981 Friedman spoke to IRS' Disclosure Officer Larry Harmeyer, who informed Friedman that the IRS would provide the requested information under the Freedom of Information Act, if the Union was willing to pay for it. Friedman advised Harmeyer that NTEU wanted the requested documents first under the Statute and Friedman noted that in the February 20 letter he listed first that he was making the request pursuant to 5 U.S.C. 7114(b)(4)(B). Harmeyer stated that he would advise Brown that NTEU wanted the information under the Statute.

On March 9, 1981 Friedman received a letter from Brown in which Brown acknowledged that although the documents were requested in the February 20 letter under both the Statute and the Freedom of Information Act, the Union sought them first under Section 7114(b)(4)(B) of the Statute. Brown stated that it was his "judgment that the referenced statute is not applicable to your request as submitted." He then went on and advised NTEU that he was forwarding the request to the Disclosure Officer who would contact the Union. He concluded by pointing out if the request is processed under the Freedom of Information Act the Union will be charged the appropriate fees.

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[4] Barcus contacted Friedman and advised him about Hunter's view concerning breaks. Friedman in turn contacted IRS Labor-Management Specialist Vickers concerning Hunter's view about breaks. There is no direct evidence that Vickers contacted Hunter.

On March 9, 1981, after receiving the above described letter, Brown spoke to Harmeyer over the telephone and Brown reiterated that he wanted the requested documents to be supplied pursuant to the Statute and not the Freedom of Information Act.

Friedman received a letter dated March 26, 1981 from IRS District Director Paul Williams advising the Union that it could have the requested documents pursuant to the Freedom of Information Act and that the union would have to pay 10 cents for each page. The documents were provided under the Freedom of Information Act and the union paid $130.

The documents were requested by NTEU in order to determine how Barcus' work compared to that of other employees in his work group. One of the criticisms of Barcus in the 60-day Warning Notice of Inefficiency concerned the time he spent in the office and his use of time. The documents requested were to enable the Union to compare Barcus' performance, especially with respect to this use of time, with that of other employees, whose performance was not criticised. The information was requested to permit the Union to determine what, if any, action NTEU would take on behalf of Barcus. The reason that the Union requested the documents was never communicated to IRS by NTEU.

Discussion and Conclusions

A. Case No. 5-CA-985

General Counsel of the FLRA contends that IRS violated Section 7116(a)(2) and (1) of the Statute because it discriminated against Barcus because Barcus had engaged in activity protected by the Statute. Barcus, a union steward who was active in the filing of grievances on behalf of himself and other employees, was engaging in activity protected by the Statute. Cf. Community Services Administration, 6 FLRA 617 (1981). Further, the record demonstrates IRS representatives were aware of Barcus' activity as Union steward and in the filing and processing of grievances.

In order to establish a violation of Section 7116(a)(2) and (1) of the Statute General Counsel must establish, in addition to the facts that Barcus engaged in protective activity and that IRS had knowledge of such activity, that IRS took action against Barcus because Barcus had engaged in the protected activity. Cf. Community Services Administration, supra; Internal Revenue Service, Washington, D.C., 6 FLRA 96 (1981). This discriminatory motivation may be inferred from the circumstances surrounding the alleged discriminatory act. See Community Services Administration, supra.

In the subject case, however, I conclude that the record establishes Hunter's treatment of Barcus, i.e. Hunter's negative case evaluations, his postponing of Barcus' performance appraisal, the issuing of the 60-day warning letter and the subsequent actions taken against Barcus, was based on Hunter's determination that Barcus' job performance was substantially deficient and was not based on Barcus' Union activity. The preponderance of the evidence establishes that upon taking over supervision of the Lafayette group Hunter had been warned by Oser of work performance deficiencies, especially on Barcus' part. Hunter exercised his responsibilities and duties conscientiously and zealously. The record establishes that his case evaluations were apparently lengthy with respect to all employees and were negative and critical with respect to a number of employees who were not alleged to have engaged in any special protected activity. Further, with respect to the allegation that he might have reviewed some greater percentage of Barcus' cases than those of other employees, the differences in percentage were not shown to be significant and were apparently due to the number of cases produced[5] and the fact that once a deficiency in work was identified, the cases were monitored to see if the deficiency had been remedied. Hunter did not treat Barcus substantially differently than Hunter treated the other employees, except insofar as warranted by Barcus' job performance. General Counsel of the FLRA points to the fact that Hunter treated Barcus differently than Barcus had been treated by his previous supervisors. The record establishes, however, that Hunter was apparently more conscientious than the prior supervisors. Hunter thus treated all the employees in the group differently than they had been treated by the prior supervisors. This, however, is not evidence from which I infer discriminatory motivation.

The record failed to establish union animus on the part of Hunter. General Counsel contends that union animus can be inferred from Hunter's treatment of Lutgen and Mynatt after they filed grievances. However, the record shows that they were not treated substantially differently than other employees, except insofar as justified by their work deficiencies. In fact when Mynatt's work had sufficiently improved Hunter gave Mynatt a within grade step increase and recommended Mynatt for promotion to a GS-11. The purpose of the Statute is not to insulate employees from discipline for deficient work merely because the employees engage in protected activity, rather it is to insure that employees are not discriminated against because they engaged in protected activity.

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[5] Hunter indicated he reviewed approximately the same number of cases for each employee, but that Barcus and a few others produced somewhat fewer cases than other employees.

In the instant case the record establishes that Hunter took the actions he did against Barcus and treated Barcus the way he did because Hunter found Barcus' job performance deficient and not because Barcus had engaged in any protected activity.

Accordingly, I conclude that Respondent's treatment of Barcus did not violate Section 7116(a)(2) and (1) of the Statute.

B. Case No. 5-CA-1015

Section 7114(b)(4) of the Statute provides:

> "(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation -
>
> "(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data -
>
> "(A) which is normally maintained by the agency in the regular course of business;
>
> "(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
>
> "(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

Section 7114(b)(4) of the Statute provides that NTEU has right to information solely within IRS' possession which is necessary and relevant to the Union's representational responsibilities, including information necessary to process a pending appeal or reply. Such a right includes information necessary to determine whether or not NTEU will take any such action. Cf. Bureau of Alcohol, Tobacco and Firearms, National Office and Western Region, San Francisco, California, 8 FLRA 547 (1982) and Department of the Navy, Portsmouth Naval Shipyard, 4 FLRA No. 82 (1980).

In the instant case the record establish that NTEU specifically requested the documents pursuant to the Section 7114(b)(4) of the Statute and that the documents were necessary and relevant in order for NTEU to decide what action to take with respect to IRS' treatment of Barcus. Accordingly, NTEU was entitled pursuant to Section 7114(b)(4) of the Statute to the requested documents. See Bureau of Alcohol, Tobacco and Firearms, National Office and Western Region, supra; Department of the

Navy, Portsmouth Naval Shipyard, supra and Veterans Administration Regional Office, Denver, Colorado, 7 FLRA 633 (1982). IRS urges that somehow, because NTEU didn't state precisely why it wanted the information, the Union lost its statutory right to the documents. This position is rejected. The Statute nowhere requires the Union to state precisely why it wants the requested information; rather, it sets forth requirements which, if met, entitles the Union to the information. Further NTEU specifically referred to that section of Statute pursuant to which it was requesting the documents and IRS never inquired as to why NTEU wanted the information.

Thus, IRS failed to meet its obligations under Section 7114(b)(4) of the Statute when it refused to give NTEU the requested documents pursuant to Section 7114(b)(4) of the Statute and insisted that the requested information be furnished pursuant to the Freedom of Information Act.[7] Accordingly, I conclude that Respondent's failure to furnish the requested information violated Section 7116(a)(1), (5), and (8) of the Statute. Cf. Bureau of Alcohol, Tobacco and Firearms, National Office and Western Region, San Francisco, California, supra and Veterans Administration Regional Office, Denver, Colorado, supra.

The record does not establish whether IRS usually charged NTEU for copies of documents provided pursuant to Section 7114 of the Statute. To the extent the $130 charged in the instant case for the documents provided, exceeds the amount usually charged for documents provided under Section 7114 of the Statute IRS should be required to refund that amount.

In view of the foregoing I recommend that the Authority adopt the following order:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Statute, it is hereby ordered that the Department of the Treasury, Internal Revenue Service and Internal Revenue Service, Indianapolis District, shall:

1. Cease and desist from:

    (a) Refusing or failing to furnish, upon request by the National Treasury Employees Union, or any other exclusive representative of its employees, all information relevant to the processing of an appeal, which information is necessary to enable the National Treasury Employees Union, or any other exclusive representative, to discharge its obligation as the exclusive representative to represent the interests of all employees in the exclusively recognized unit.

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[7] The record does not establish whether the sanitized information furnished under the Freedom of Information Act was insufficient. Accordingly, I make no finding with respect to the sufficiency of the information supplied.

(b) Charging any amount in excess of the amount usually charged, if any, for the supplying of documents to National Treasury Employees Union, or any other exclusive representative of our employees, when such documents are provided pursuant to Section 7114 of the Statute.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute:

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Upon request, make available to the National Treasury Employees Union, or any other exclusive representative of its employees, all information relevant to the processing of an appeal, which information is necessary to enable the National Treasury Employees Union, or any other exclusive representative, to discharge its obligation as the exclusive representative to represent the interests of all employees in the exclusively recognized unit.*/

(b) Refund any monies charged in excess of the amount usually charged, if any, for the supplying of documents to National Treasury Employees Union, or any other exclusive representative of our employees, when such documents were provided pursuant to Section 7114 of the Statute.

(c) Post at its facilities of the Department of the Treasury, Internal Revenue Service and Internal

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*/ As noted in the Judge's Decision and Order, the record reflects that the information requested was furnished pursuant to a request under the Freedom of Information Act, and the adequacy thereof is not at issue herein. Therefore, the Authority deems it unnecessary to order the Respondent to produce the specific material.

Revenue Service, Indianapolis District, located in Indianapolis, Indiana and Lafayette, Indiana, copies of the attached Notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by a responsible official and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The responsible official shall take reasonable steps to insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region V, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

IT IS ORDERED that the complaint in Case No. 5-CA-985 be and it hereby is dismissed.

SAMUEL A. CHAITOVITZ
Administrative Law Judge

Dated: July 23, 1982
Washington, D.C.

[5-CA-985; 5-CA-1015]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse or fail to furnish, upon request by the National Treasury Employees Union, or any other exclusive representative of our employees, all information relevant to the processing of an appeal, which information is necessary to enable the National Treasury Employees Union, or any other exclusive representative, to discharge its obligation as the exclusive representative to represent the interests of all employees in the exclusively recognized unit.

WE WILL NOT charge any amount in excess of the amount usually charged, if any, for the supplying of documents to National Treasury Employees Union, or any other exclusive representative of our employees, when such documents are provided pursuant to Section 7114 of the Statute.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Statute.

WE WILL, upon request, make available to the National Treasury Employees Union, or any other exclusive representative or our employees, all information relevant to the processing of an appeal, which information is necessary to enable the National Treasury Employees Union, or any other exclusive representative, to discharge its obligation as the exclusive representative to represent the interests of all employees in the exclusively recognized unit.

WE WILL refund any monies charged in excess of the amount usually charged, if any, for the supplying of documents to National Treasury Employees Union, or any other exclusive representative of our employees, when such documents were provided pursuant to Section 7114 of the Statute.

____
(Agency or Activity

Dated: ____________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other materials.

If employees have any question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 5, whose address is: 175 West Jackson Boulevard, Suite A-1359, Chicago, Illinois 60604, and whose telephone number is (312) 886-3468

[8-CA-20006]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND

(Respondent)

and

Case No. 8-CA-20006

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on July 28, 1982, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29 of the Authority's rules and regulations, as amended (5 CFR 2423.29 (1982)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusion, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violation and take the affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., September 2, 1982

James J. Shepard

James J. Shepard, Executive Director

[8-CA-20006]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

SOCIAL SECURITY ADMINISTRATION BALTIMORE, MARYLAND Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	Case No.: 8-CA-20006

Wilson Schuerholz, Esq.
For the Respondent

E. A. Jones, Esq.
For the General Counsel

Jeffrey Dasteel
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding arising under the Federal Service Labor-Management Relations Statute (herein called the Statute or Act). It is based on a charge filed on October 2, 1981 by American Federation of Government Employees, AFL-CIO (herein called the Union) against Social Security Administration, Baltimore, Maryland (herein called the Respondent).

A Complaint and Notice of Hearing, based on said charge, was issued on December 21, 1981 by the Regional Director for the Federal Labor Relations Authority, Los Angeles, California Region. The said Complaint alleged, in substance, that on or about September 28, 1981[1] Respondent unilaterally changed working conditions of unit employees at its Huntington Park District office by prohibiting employees from having non-alcoholic beverages at their desks without notifying the Union or providing it with an opportunity to bargain over the change - all in violation of Sections 7116(a)(1) and (5) of the Statute.

Respondent's Answer to the Complaint, dated January 4, 1982, denied the aforesaid allegation as well as the commission of any unfair labor practice.

A hearing was held before the undersigned on March 18, 1982 at Los Angeles, California. All parties were represented thereat, and each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed with the undersigned which have been duly considered.

Upon the entire record herein, from my observation of the withnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein the Union has been, and still is, the collective bargaining representative of Respondent's general schedule employees, including such unit employees at the Huntington Park District office in Huntington Park, California.

2. Approximately 70-80 employees are employed at the aforesaid district office which is located in a large rectangular, one-story building. The various employees, which include claims representatives and claims development clerks, are organized into modules or units with a supervisor for each module. Work is conducted in a large open area on the floor where employees work at desks visible to respective supervisors. The lunchroom[2], stockroom and management offices are not in the open area and are not visible therefrom.

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[1] At the hearing General Counsel amended paragraph 11 of the complaint by changing the date from September 28 to September 25, 1981.

[2] Vending machines containing food and beverages were located thereat.

3. Staff meetings are generally conducted by Respondent on Friday of each week, and they are attended by all employees and supervisors. At the staff meeting on September 25, 1981 District Manager Leonardo Fernandez reminded the employees that no liquids (including coffee, soda or water) were permitted at their desks at any time. The manager mentioned he was particularly concerned about spilling coffee on a new carpet laid in the recent annex to the old building.

4. Record facts reflect that at a staff meeting on April 24, 1981 Fernandez mentioned to the employees that no drinks were allowed on the floor, especially when the new part of the building is completed. Further, the District Manager announced this prohibition as to liquids at desks several times a year at staff meetings. He testified that on four occasions during the past eight years he spoke to violators in this regard. Employee Raishart testified that years ago the assistant manager, or operations officer, mentioned[3] at staff meetings that liquids should not be on employees' desks after 9:00 a.m.

5. Despite the enunciation by management that beverages were not permitted on the floor, the record reveals that it was customary, prior to September 25, 1981, for various employees to bring soft drinks, or water, to their desks during the workshift.[4] Employees would frequently finish those drinks at their desks after lunch, and record facts disclose that, on occasion, supervisors finished beverages at their desks in the past. The record also indicated that in each module the employees' desks were within view of the supervisor. Several individuals stated that no comment was made by supervisory personnel on many occasions when employees had beverages, which were visible to supervisors, on their desks. Claims Representative Rolando Longario testified, and I find, that none of his five supervisors ever spoke to him regarding having beverages on his desk prior to September 25, 1981. Terrence Evanston, a like employee, testified, and I find, that none of his four supervisors spoke to him concerning liquids on his desk prior to said date.

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[3] The rule restricting the use of beverages or liquids at the desks of employees was never embodied in a written memorandum or notice to the staff.

[4] Management was particularly sensitive about the reaction of the public to employees drinking coffee at work. Hence, the supervisors were strict in prohibiting coffee at desks after 9:00 a.m. Hence, I find the rule as to coffee was enforced by management and complied with by employees.

6. Janice Raishart testified, and I find, that employees continued, after September 25, 1981, to have beverages at their desks since the restrictive policy was not enforced until about two weeks later. Another staff meeting was then held by management at which time the policy in regard to liquids was repeated. No employees have brought beverages to their desks since that time. All food and drinks are to be consumed in the lunchroom during breaks or at lunch time.

7. Respondent concedes, and I find, that no notification was given by management to the Union concerning the prohibition of beverages on desks, as announced on September 25. Management neither advised the Union that the rule would be enforced nor sought to bargain with the representative regarding the restrictive policy.

Conclusions

It is contended by General Counsel that on September 25, 1981 Respondent unilaterally changed working conditions at the Huntington Park District office by prohibiting employees from having beverages at their desks. In support of this contention it is asserted that, prior to the aforementioned date, the agency permitted employees to have beverages at desks during work hours; that this practice existed for many years; and that management changed this practice - which had become a condition of employment - without notification to, or bargaining with, the Union herein.

Respondent takes the position that the announcement on September 25, 1981 was not a change in employment conditions. It argues that the rule against permitting drinks at employees' desks was a long standing one; that the policy outlawing beverages at desks was merely reaffirmed on September 25. Since no change occured with respect to this matter, it is claimed there was no need to notify the Union in this regard or bargain with it concerning the prohibition.

It is settled and undisputed in the public sector that an employer may not unilaterally change conditions of employment. Any such changes require, in advance, notification to the bargaining agent and, upon request, negotiations with the union in respect thereto. Further, terms and conditions of employment may be established by practice, as well as some form of tacit or informal agreement, and these also may not be altered in the absence of agreement or impasse without good faith bargaining. Internal Revenue Service and Brookhaven Service Center, 6 FLRA No. 127; Department of the Navy, Naval Underwater Systems Center, Newport Naval Base, 3 FLRA No. 64. It is also true that to constitute the establishment by practice of a term and condition of employment, the practice must be consistently exercised for an extended period of time with Respondent's knowledge and consent. See United States Department of Justice, United States Immigration and Naturalization Service, 9 FLRA No. 36; Department of the Navy, Naval Underwater Systems Center Newport Naval Base, supra.

In the case at bar it is apparent that, despite management's pronounced rule against drinking beverages at desks, the employees adhered to the practice of doing so for many years. The credited testimony of General Counsel's witnesses reflects that the rule was honored more in its breach than observance. Thus, for a very extended period employees brought soft drinks to their desks upon returning from the lunchroom or after 'coffee breaks'. Moreover, the module supervisors, whose desks were stationed close to those of their unit workers, did not - except on rare occasions - censure or confront the employees who drank beverages at their desks. While Respondent's District Manager, Leonardo Fernandez, reminded the staff at a meeting on April 24, 1981, that such conduct was not permitted, the employees continued to have liquids, other than coffee, at their desks thereafter. Further, record facts reveal they did so in the presence of supervisors and, for the most part, were neither challenged nor rebuked therefor. This pattern of behavior, exercised over such a long period of time, persuades me that Respondent impliedly consented to such conduct albeit the policy may have been to the contrary. Under these circumstances, the practice of drinking beverages by employees at their desks ripened into a condition of employment.

Respondent urges that the September 25, 1981 announcement was merely a reiteration of its rule or policy rather than a change in any term or condition of employment. A similar argument was made by the employer in New York Army and Air National Guard, Albany, NY, A/SLMR No. 441. In the cited case the National Guard issued a memoranda in May, 1971 to some unit employees which reiterated the requirement that military forms of address be used in formal correspondence. The Activity had tolerated, since 1969, extensive deviations from the regulatory requirement. It was concluded by the Assistant Secretary that, under those circumstances, the memoranda constituted a change in working conditions. Accordingly, the failure by management to meet and confer with the bargaining representative regarding the use of military titles was violative of Executive Order 11491, as amended.[5] I feel constrained, likewise, to reject the Respondent's contention herein that the September 25 announcement was just a reaffirmation of an existent rule. The agency has tolerated continued departures from its requirement that all beverages be consumed in the lunchroom and not at employees' desks. Thus, I conclude the termination on September

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[5] The predecessors to the Federal Service Labor-Management Relations Statute.

25, 1981 of the practice of drinking liquids, other than coffee, at such desks was a change in such practice.[6]

Respondent, in its brief, cites Social Security Administration, Tulsa District Office, Tulsa, Oklahoma, 1 FLRA No. 67, in support of its position that there was no change herein of a working condition. The employer in the cited case issued a memorandum on January 24, 1978 regarding its policy on food and drink at desks. It was expressly stated that the purpose of the memo was to remind the employees of the existing policy, to wit: food and drink were not to be at employees' desks after 9:00 a.m. This policy had been in effect since 1972, and it was concluded that the memorandum of 1978 was not a unilateral change so as to violate Executive Order 11491, as amended. I am persuaded, however, that the Oklahoma case is distinguishable from the one at hand. In the cited case the employees had substantially complied with the policy of not allowing drinks at desks. Thus, the occasional laxity in enforcing the rule was not deemed significant. In the case at bar the evidence is contrariwise. The policy was scarcely complied with at all, and the lax enforcement by management had created and induced a practice by employees of bringing beverages to desks during working hours. As such, and in contrast to the cited case, the said practice had been tolerated and sanctioned for years by management so as to develop into a condition of employment.

Accordingly, I conclude that the unilateral change of this practice by the announcement on September 25, 1981 on the part of management, and its attempted enforcement thereafter, without notifying the Union herein and bargaining with respect thereto, are violations of Sections 7116(a)(1) and (5) of the Statute. In accordance therewith I recommend the Authority adopt the following order:

ORDER

Pursuant to Sections 7118(a)(7) of the Federal Service Labor-Management Relations Statute and Sections 2423.29 of the Rules and Regulations, it is hereby ORDERED that the Social Security Administration, Baltimore, Maryland, shall:

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[6] See also Social Security Administration, Cincinnati Downtown Office, Cincinnati, Ohio, A/SLMR No. 1124 (appeal denied in 1 FLRA 129) where the employer's implementation of a policy prohibiting food and drink in the office was deemed a change in existing personnel practice, rather than a reaffirmation of an existing practice. This conclusion was based, in large part, on the fact that prior to the issuance of the policy, a strict food and drink policy had fallen into disuse. (Nothwithstanding this conclusion, no unfair labor practice was found since it was determined that the employer had bargained with the union as to the change.)

1. Cease and desist from:

(a) Instituting changes with respect to the past practice of permitting employees to drink beverages, other than coffee, at their desks during working hours, without first notifying and, upon request, bargaining in good faith with the American Federation of Government Employees, AFL-CIO, the exclusive representative of its employees.

(b) In any like or related manner interferring with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative actions:

(a) Rescind and revoke the September 25, 1981 announced change in the established practice of permitting employees to drink beverages, other than coffee, at their desks during working hours, and, upon request, bargain in good faith with respect to any such intended change with the American Federation of Government Employees, AFL-CIO, the exclusive representative of its employees.

(b) Post at its Huntington Park, California facility, copies of the attached notice, on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the District Director of the Social Security Administration, Huntington District Office, Huntington Park, California, and shall be posted and maintained by him for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The District Director shall take reasonable steps to insure that said notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director, Region 8, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

William Naimark
WILLIAM NAIMARK
Administrative Law Judge

Dated: July 28, 1982
Washington, D.C.

[8-CA-20006]

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT institute changes with respect to the past practices of permitting employees to drink beverages, other than coffee, at their desks during working hours, without first notifying and, upon request, bargaining in good faith with the American Federation of Government Employees, AFL-CIO, the exclusive representative of its employees.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL rescind and revoke the September 25, 1981 announced change in the established practice of permitting employees to drink beverages, other than coffee, at their desks during working hours, and, upon request, bargain in good faith with respect to any such intended change with the American Federation of Government Employees, AFL-CIO, the exclusive representative of our employees.

____
(Agency or Activity)

Dated: ______________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Region VIII for the Federal Labor Relations Authority whose address is: 350 South Figueroa Street, 10th Floor, Los Angeles, CA 90071 and whose telephone number is: (213) 688-3805.

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9-3/16

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 16

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

October 13, 1982

UNFAIR LABOR PRACTICE CASES

Case No. 2-CA-20001 (September 30, 1982)

Veterans Administration, Veterans Administration Medical Center, Lebanon, Pennsylvania and American Federation of Government Employees, Local 1966, AFL-CIO

Case No. 9-CA-20072 (September 30, 1982)

Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and American Federation of Government Employees, AFL-CIO

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* This report series includes decisions and orders of FLRA adminsitrative law judges to which no exceptions were filed with the Authority within the prescribed time limit. In accordance with section 2423.29(a) of the Authority's rules and regulations, as amended (46 Fed. Reg. 40674 (1981)), the findings, conclusions, and recommendations in such ALJ decisions constitute, without precedential significance, findings, conclusions, decisions and orders of the Authority.

Y 3.F 31/21-3:

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION,
VETERANS ADMINISTRATION MEDICAL CENTER,
LEBANON, PENNSYLVANIA

(Respondent)

and

Case No. 2-CA-20001

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1966, AFL-CIO

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on August 20, 1982, finding that the Respondent had engaged in the alleged unfair labor practice and recommending that the Respondent cease and desist therefrom and take certain affirmative action.

No exceptions to the Decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's rules and regulations, as amended (5 CFR § 2423.29(a) (1982)), the findings, conclusions, and recommendations in the Decision of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations and take the affirmative action set forth in the Order.

For the Authority.

Issued, Washington, D.C., September 30, 1982

James J. Shepard, Executive Director

[2-CA-20001]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

VETERANS ADMINISTRATION,
VETERANS ADMINISTRATION MEDICAL CENTER,
LEBANON, PENNSYLVANIA

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1966, AFL-CIO

Charging Party

Case No. 2-CA-20001

Jose H. Lopez, Esquire
For the Respondent

Lee Mingledorff, Esquire
For the General Counsel

Martin R. Cohen, Esquire
For the Charging Party

Before: LOUIS SCALZO
Administrative Law Judge

DECISION

Statement of the Case

This case arose as an unfair labor practice proceeding under the provisions of the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. §7101, et seq., (hereinafter called "the Statute") and Rules and Regulations issued thereunder.

The complaint alleges that on or about May 15, 1981, the Veterans Administration, Veterans Administration Medical Center (VAMC), Lebanon, Pennsylvania (Respondent),[1] through Dr. Murray Feldberg, Chief of Staff at the VAMC, committed an unfair labor practice within the meaning of Section 7116(a)(1) of the Statute by telling a bargaining unit employee that another bargaining unit employee, one Dr. Andrew Lefko, would not be promoted because he had engaged in protected activities on behalf of the American Federation of Government Employees, Local 1966, AFL-CIO (Charging Party or Union). The complaint also alleges that on or about June 5, and August 28, 1981, the Respondent, through Dr. Feldberg violated Sections 7116(a)(1) and (2) of the Statute by executing performance appraisals which did not recommend Dr. Lefko for promotion because of his membership in, and activities on behalf of, the Union herein.

Counsel representing the Repondent argues that evidence introduced at the hearing did not prove the allegations of the complaint; and further, that comments made by Dr. Feldberg on performance appraisals were motivated by lawful reasons associated with his performance of duties as Chief of Staff at the VAMC.

The parties were represented by counsel during the hearing and were afforded full opportunity to be heard, adduce relevant evidence, and examine and cross-examine witnesses. Post-hearing briefs were received from counsel of record. Based upon the entire record herein, including my observations of the witnesses and their demeanor, the exhibits, and other relevant evidence adduced at the hearing,[2] and the briefs filed, I make the following findings of fact, conclusions and recommendations.

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[1] The complaint as captioned refers to the Respondent as, the "Veterans Administration" in general terms, and to the "Veterans Administration Medical Center, Lebanon, Pennsylvania" specifically. The suggested reference to the national office of the agency may be disregarded as counsel representing the General Counsel and the Union do not contend that the national office is implicated, and the record reflects no showing that the national office of the Veterans Administration is otherwise involved (Tr. 204-208).

[2] Under authority provided in Section 2423.19(r) of the Regulations, 5 C.F.R. §2423.19(r), the following corrections are made in the hearing transcript:

Page	Line	Change	To
14	17	"7116 8/2"	"7116(a)(2)"
135	16	"19"	"18"
141	21	"aquisation"	"accusation"

Circumstances Relating to Dr. Andrew Lefko's Role as a Union Representative

The VAMC employs approximately 40 physicians, most of whom are members of the bargaining unit represented exclusively by the Union. Physicians are assigned to Departments of Psychiatry, Medicine and Surgery, and these departments are under the administrative control of Dr. Feldberg. As Chief of Staff, Dr. Feldberg, in turn, served under the Director of the VAMC. Dr. Lefko was a staff member assigned to the Department of Psychiatry, and was under the direct supervision of Dr. Robert Allen, Chief of the Department of Psychiatry. A total of 11 physicians were assigned to the Department of Psychiatry, six of whom, including Dr. Lefko, were psychiatrists.

During all times material herein Dr. Lefko was chief steward for the Department of Psychiatry, and handled all labor relations problems falling within the purview of his Department. He also served as steward for all physicians in the bargaining unit represented by the Union. He was thrown into close contact with VAMC management, particularly Dr. Feldberg, management's chief spokesman. As the chief spokesman for bargaining unit members in the Department of Psychiatry, Dr. Lefko was a particularly active participant at labor-management meetings at the VAMC. In the latter capacity he handled most of the presentations on behalf of the Union.3/

Prior to Dr. Feldberg's evaluation of Dr. Lefko, Dr. Feldberg and Dr. Lefko had disagreements over a number of issues raised at labor-management meetings. These included disputes involving the adequacy of training provided psychiatrists assigned to perform duties as medical officer of the day; the accuracy of management in preparing the minutes of labor-management meetings; the amount of fees paid to outside physicians for duties performed while employed as medical officer of the day; procedures for the distribution of certain education funds; management's policy in granting time off to physicians; the alleged issuance of VAMC policy affecting bargaining unit members without first consulting with the Union; alleged failure of management to respond to issues; alleged interference by Dr. Feldberg with the work of physicians; a claimed lack of physician representation on hospital committees; and criticism of Dr. Feldberg's relationship with the professional staff, and handling of professional staff meetings. Disputes between Dr. Feldberg

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3/ The Respondent acknowledged that "Dr. Lefko was an active, if not the most active Union representative at the hospital" (Tr. 209).

and Dr. Lefko were "heated" in nature, and at times ended with Dr. Lefko threatening to go over Dr. Feldberg's head or outside of the VAMC to resolve issues.

It was also disclosed that a grievance filed by Dr. Lefko against VAMC management was decided by an arbitrator in favor of the Union in June of 1981. Dr. Lefko was a key witness during a hearing involving the matter in March of 1981.

Dr. Feldberg Discusses Dr. Lefko's Union Activities with Dr. Nemzoff

Dr. Sol Leon Nemzoff, a psychiatrist, commenced employment at the VAMC on January 11, 1981. He was a member of the bargaining unit and was assigned to the Department of Psychiatry. Dr. Nemzoff developed a friendship with Dr. Feldberg and Dr. Lefko shortly after his arrival.

Dr. Nemzoff and Dr. Feldberg resided in the same quarters at the VAMC during Monday through Thursday commencing in January of 1981, and they participated in numerous conversations and social activities together. Dr. Lefko was discussed by Dr. Feldberg many times during a period commencing in January of 1981 and ending a few months thereafter. During many of these conversations Dr. Feldberg indicated that he was angry with Dr. Lefko because of difficulty created by Dr. Lefko's stance on labor-management relations issues. Dr. Feldberg indicated that Dr. Lefko was going about things the wrong way; that he was too outspoken at meetings; that he had better "watch out"; that his position on labor relations issues was antagonizing Dr. Feldberg, and the VAMC Director; that problems were being generated by Dr. Lefko's Union activity, and his role as a Union steward; that Dr. Lefko was getting himself into trouble; and that Dr. Lefko would not receive a desired promotion to the Chief of the Department of Psychiatry because, "If you want to become Chief, you don't have anything to do with unions" (Tr. 92, 99). At another point he stated in substance that, "Lefko will never become Chief" (Tr. 92, 103).4/

Dr. Nemzoff first reported the substance of these conversations to Dr. Lefko sometime in March or April of 1981. One or two months later he also had conversations with Dr. Lefko about Dr. Feldberg's views relating to Dr. Lefko's Union activity. One such conversation occurred in May of 1981 (Tr. 43). He warned Dr. Lefko that his career and promotion prospects were being endangered by his Union activity, and that he should moderate his approach.

4/ Dr. Feldberg admitted that he did discuss Dr. Lefko in general terms, but was vague in answering whether he had discussed with Dr. Nemzoff, any reservations and complaints that he (Dr. Feldberg) had concerning Dr. Lefko's performance (Tr. 138).

The record disclosed that Dr. Feldberg was critical of Dr. Nemzoff's professional performance, but that this pattern of criticism did not commence until after Dr. Nemzoff first reported the substance of Dr. Feldberg's conversations to Dr. Lefko.

Dr. Lefko's May 1981 Career Development Interview, and Dr. Feldberg's Subsequent Execution of Proficiency Reports Concerning Dr. Lefko on or about June 5, 1981 and August 28, 1981

In May of 1981, Dr. Lefko participated in a career development interview with Dr. Feldberg and Dr. Allen, Chief of the Department of Psychiatry. Dr. Lefko was asked what he thought were the problem areas facing the Department of Psychiatry; and in response, Dr. Feldberg was provided with Dr. Lefko's views concerning many problem areas in the Department. When asked concerning his career goals, Dr. Lefko replied that he was looking forward to serving in a Chief of Service position as head of a Department of Psychiatry in the Veterans Administration. This career goal was not subsequently modified or withdrawn by Dr. Lefko.5/

On June 2, 1981, Dr. Allen evaluated Dr. Lefko's performance for the period June 9, 1980 to June 9, 1981.6/ He rated him at the highest level

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5/ Dr. Lefko's testimony is relied upon as a basis for this account of the career development interview. However, Dr. Allen's testimony fully corroborated those portions relating to Dr. Lefko's career goals in the Veterans Administration. Because of this persuasive corroboration and other reasons hereinafter described, it is determined that there is no basis whatsoever for accepting as true, Dr. Feldberg's testimony to the effect that Dr. Lefko told Dr. Feldberg prior to June 5, 1981, that he (Dr. Lefko) had no interest in becoming a Chief of Service.

6/ Using a slightly different Proficiency Report form for annual rating periods ending on June 9, 1980, and June 9, 1979, Dr. Lefko was evaluated by Dr. Allen, and was given the highest rating in six categories, and the next to highest in four categories for overall "satisfactory" ratings for each of these two prior rating periods. Both of these reports reflect a number of favorable comments by Dr. Allen. The reports were approved without comment by officials preceding Dr. Feldberg in the Chief of Staff position.

As a Chief of Service (department head), Dr. Allen rated his own staff members; and the Chief of Staff reviewed these ratings as an "approving official." Those in Chief of Service positions would in turn be evaluated directly by the Chief of Staff. In his capacity as an "approving official," in the evaluation of a staff member such as Dr. Lefko, Dr. Feldberg had the authority to add his own comments concerning the evaluation if such evaluative comments were otherwise appropriate.

("excellent"), in clinical competence, and at the second highest level ("high satisfactory") in educational competence, administrative competence, personal qualities, and overall evaluation. Dr. Allen's evaluation noted a number of favorable comments, including a reference to original thinking, skill in supervising others, his "many suggestions for the betterment of the service," and his enthusiasim in serving on the staff.

Dr. Feldberg completed his review of the June 2, 1981 Proficiency Report on June 5, 1981.[7] He noted that he didn't agree "entirely" with Dr. Allen's assessment. He then stated in part:

> Dr. Lefko is seen as the unofficial leader of the Psychiatry Service. He is articulate at times, confident, and he has an aura of technical competence. That he is looked to by his colleagues for leadership is quite justified. He is turned to by Psychiatry Service staff and the service chief for guidance.
>
> At one time or another, he has been thought of as a potential service chief. At one time or another the encumbent of the Chief of Staff's office has viewed Dr. Lefko as a means of introducing some activity in an otherwise taciturn service.
>
> I have been most disappointed, however, that the originally perceived promise of enlisting Dr. Lefko's assistance in dealing with the many defects in Psychiatry Service has not been borne out. Perhaps, a larger effort has been made than I am aware of, but much more had been expected from this perceptive professional. In consequence of this experience, I had occasion to chat with my predecessor who, I learned, had at one time actually gone on record as desiring the appointment of Dr. Lefko as assistant chief of service and to discover that he later withdrew his recommendation.
>
> . . . .
>
> Dr. Lefko does not tend to follow through on his observations but permits himself to slip into an

---

[7] The record discloses that on June 4, 1981, and prior thereto, Dr. Feldberg and Dr. Lefko had engaged in a series of heated discussions concerning labor relations issues (G.C. Exhs. 2-9, Tr. 31-39).

> attitude of hopelessness and inertia which, he feels, is justified because of the working situation here. This is not a rationalization that I can agree with (G.C. Exh. 14).

Dr. Allen totally disagreed with Dr. Feldberg's comments (Tr. 83). He testified that the quoted language was "riddled with inaccuracies," and was unfair (Tr. 80). He stated that he never made statements to Dr. Feldberg which would justify Dr. Feldberg's evaluation (Tr. 79-81); that Dr. Feldberg had "very little" opportunity to observe Dr. Lefko's work (Tr. 80-81, 83);[8/] and that complimentary comments reflected in the first two paragraphs of Dr. Feldberg's evaluation were clearly inconsistent with comments reflected in the last two paragraphs (Tr. 80-82).

Dr. Feldberg's testimony concerning the June 5, 1981 comments recorded on the Proficiency Report was vague, contradictory and inconsistent in content. He admitted that the comments were negative in terms of according Dr. Lefko consideration as a possible candidate for Chief of Service (Tr. 109-110); and that on the date of his comments (June 5, 1981), he would not have recommended Dr. Lefko as a candidate for Chief of Service (Tr. 146). However, he also took the position that his comments did not constitute a "negative" appraisal (Tr. 139).

With respect to his opportunity to observe Dr. Lefko, he admitted that he had never actually supervised Dr. Lefko (Tr. 136), and that he did not discuss the matter with Dr. Allen either before or after his evaluation (Tr. 126-127). With respect to Dr. Lefko's desire to obtain a promotion, Dr. Feldberg stated unequivocally that he did not consider him to be available for promotion because Dr. Lefko had declined such consideration; yet the tone of Dr. Feldberg's comments conveys the clear impression that he considered him to be a viable candidate.[9/]

[8/] The record disclosed only two or three brief personal work contacts between Dr. Lefko and Dr. Feldberg apart from numerous encounters in connection with labor relations matters (Tr. 54, 71-72).

[9/] As previously noted Dr. Feldberg's account of Dr. Lefko's declination was not credited. There would have been no reason for Dr. Feldberg to go into such detail concerning his suitability for the position of Chief of Service if he was not then in fact a possible candidate for future consideration. Moreover, Dr. Feldberg's account of Dr. Lefko's alleged refusal to be considered was contradicted by other elements of the record. An example of this is found in the testimony of the VAMC's Chief of Personnel Service, Samuel P. Alitto. He testified that Dr. Feldberg would not have evaluated him as a potential candidate for promotion if Dr. Lefko was not actually a prospective candidate for that position (Tr. 176-177).

As a staff member Dr. Lefko had no responsibility for the overall performance of the Department of Psychiatry (Tr. 110). Nevertheless, Dr. Feldberg's rating of Dr. Lefko was based upon the premise that Dr. Lefko had such responsibility (Tr. 110-111, 115-116, 120-121, 125-126, 129-130). Dr. Feldberg's criticism rested in part on a failure of Dr. Lefko to introduce helpful ideas (Tr. 118); yet Dr. Allen's evaluation indicated that Dr. Lefko was a source of such ideas (G.C. Exh. 14). Although placed on notice of such contributions by Dr. Allen's evaluation, Dr. Feldberg testified that he was not aware that Dr. Lefko had made suggestions of a helpful nature (Tr. 118, 122, 124).[10] At another point, Dr. Feldberg agreed that Dr. Lefko was performing satisfactorily as a member of an Admissions Unit in the Psychiatry Department (Tr. 115, 123); yet he was critical of the role played by Dr. Lefko in the Admissions Unit (Tr. 118-120, 130-133).[11]

Internal inconsistency in Dr. Feldberg's evaluation is also reflected by his reference to a conversation with a prior Chief of Staff regarding consideration of Dr. Lefko for a newly proposed position as Assistant Chief of Service. The mentioned comment in the evaluation indicates that Dr. Feldberg's predecessor "withdrew his recommendation" of Dr. Lefko. The absence of further explanation in the evaluation leaves a basis for drawing negative inferences from the statement; yet Dr. Feldberg suggests that the language was inserted as a favorable comment (Tr. 129-130, 145-146).

On June 23, 1981, Dr. Lefko met with Dr. Feldberg and questioned the validity of Dr. Feldberg's evaluation;[12] and by memorandum of the same date Dr. Lefko appealed to Mr. Samuel Alitto, the Chief of Personnel Service at the VAMC (G.C. Exh. 15). Dr. Feldberg met with Mr. Alitto concerning the appeal and was told that Dr. Feldberg could not evaluate Dr. Lefko as a candidate for the position of Chief of Service because he was not under consideration for such a promotion (Tr. 136, 167). Dr. Feldberg agreed to modify his evaluation, and they discussed language to be used by Dr. Feldberg in a revised version of the Proficiency Report (Tr. 168-170). Mr. Alitto persuaded Dr. Feldberg to omit most of the derogatory comments in a revised evaluation (Tr. 177-178). This position was communicated to Dr. Lefko by Mr. Alitto in a memorandum dated July 21, 1981 (G.C. Exh. 16).

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[10] The record disclosed that within two or three months of Dr. Feldberg's arrival to serve as Chief of Staff, Dr. Lefko addressed to Dr. Feldberg at least four memorandums setting forth suggestions for improving the Department of Psychiatry. These were submitted to Dr. Feldberg through Dr. Allen (Tr. 187-188).

[11] Dr. Feldberg acknowledged that it was Dr. Allen's responsibility, and not Dr. Lefko's task, to direct the Admissions Unit. Nevertheless, Dr. Lefko's evaluation was based in part on Dr. Lefko's failure to correct perceived shortcomings in the unit (Tr. 133-134).

[12] Dr. Feldberg's testimony does not contradict a statement by Dr. Lefko to the effect that during the meeting Dr. Feldberg acknowledged that comments made in the Proficiency Report were, "impressions which I did not check on" (Tr. 53).

At a meeting with Mr. Alitto following Mr. Alitto's July 21, 1981 memorandum, Dr. Lefko expressed his disapproval concerning resolution of the matter based upon a revision of the evaluation, but agreed reluctantly to any change designed to lessen the impact of the evaluation. However, Mr. Alitto advised Dr. Lefko, that Dr. Feldberg would insist upon inserting a comment to the effect that Dr. Lefko was not a candidate for promotion to a Chief of Service position (Tr. 57, 187, 189-191).

By memorandum dated August 4, 1981, Dr. Lefko set forth his position in opposition to Mr. Alitto's earlier July 21, 1981 memorandum, and among other things noted that his activities as Union steward influenced Dr. Feldberg in his role as an approving official (G.C. Exh. 17).

On or about August 28, 1981, Dr. Lefko received a revision of Dr. Feldberg's earlier June 5, 1981 evaluation (G.C. Exh. 18). All prior comments were deleted; however, the revised evaluation included the following statement:

> To the best of my knowledge, Dr. Lefko is performing his work as a ward physician (psychiatrist) adequately. He is not at present a candidate for a chief of service position.

Dr. Lefko acknowledged receipt on the document, noting that he did not wish to discuss the issue further and that he was interested in a promotion. By memorandum dated August 28, 1981, Dr. Lefko informed Mr. Alitto that he planned to take other steps to resolve the issue, and asked that Dr. Feldberg's June 5, 1981 evaluative comments, and that the revision supplied on or about August 28, 1981, together with all related correspondence remain in his official personnel file as he intended to seek legal assistance in an effort to resolve the matter (G.C. Exh. 19).

Dr. Allen's testimony established that Dr. Feldberg's reference in the revision to Dr. Lefko's unavailability was false because Dr. Lefko did wish to be considered for promotion (Tr. 86-87).[13] As previously noted this finding is fully supported by the language used in Dr. Feldberg's June 5, 1981 comments, and directly by Dr. Lefko's statements which are fully corroborated. Also, on this point Mr. Alitto testified that Dr. Feldberg prepared the revised statement himself (Tr. 179-180), and that he viewed Dr. Feldberg's insistence on the inclusion of such a statement as merely "a way that Dr. Feldberg avoided making any comment at all concerning Dr. Lefko's potential for a supervisory position" (Tr. 174). Thus, it is clear that Dr. Feldberg's revised comments were merely an attenuated, but substantially damaging, version of his earlier comments.

Discussion and Conclusions

Sections 7116(a)(1) and (2) of the Statute provide:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--
>
> > (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
> >
> > (2) to otherwise encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment. . .

Section 7102 of the Statute sets forth certain employee rights including the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and further that each employee shall be protected in the exercise of such right.

In Federal Mediation and Conciliation Service, 9 FLRA No. 31 (1982), 9 FLRA 199, the Authority by adopting the following language of Administrative Law Judge Alan W. Heifetz provided guidance with respect to the standard by which one may determine whether there has been interference, restraint or coercion:

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[13] An effort was made to discredit the testimony of Dr. Allen by showing that Dr. Feldberg was dissatisfied with Dr. Allen's performance. However, there is no basis in the record for rejecting the testimony of Dr. Allen; and his testimony is corroborated by other elements in the record.

> That standard by which one may determine interference, restraint or coercion, is not the subjective perceptions of the employee, nor is it the intent of the employee. Rather the test is whether, under the circumstances of the case, the employer's conduct may reasonably tend to coerce or intimidate the employee, or, in the case of a statement, whether the employee could reasonably have drawn a coercive inference from the statement. The effect of the employer's statements must be judged in the light of circumstances in which words, innocent in and of themselves, may be understood as threats. [Footnotes omitted].

It is concluded that Dr. Nemzoff's account of numerous discussions with Dr. Feldberg concerning Dr. Lefko's Union activities may be fully credited, and Dr. Feldberg's denials discredited. Further, it is specifically determined that the record establishes by a preponderance of the evidence that approximately on or about May 15, 1981, Dr. Feldberg, in substance, told Dr. Nemzoff, a bargaining unit employee, that Dr. Lefko would not be promoted because he had engaged in activities on behalf of the Union.

The mentioned statement of Dr. Feldberg reasonably tended to coerce and intimidate Dr. Nemzoff, and Dr. Nemzoff could have reasonably drawn a coercive inference from the statement. In fact, Dr. Feldberg's statement reflects that he was seeking to undermine Dr. Nemzoff's confidence in the Union. The statement would necessarily have had a chilling effect on his exercise of rights under the Statute. Accordingly, it is concluded that the Respondent, through Dr. Feldberg's statement to Dr. Nemzoff, committed an unfair labor practice within the meaning of Section 7116(a)(1).[14/]

In order to establish a violation of Section 7116(a)(2) there must be a showing that the alleged victim of discrimination was engaging in protected activity, that the agency had knowledge of such activity, and that the agency took action because of anti-union animus. United States Department of Labor, 1 FLRA No. 120 (1979); Veterans Administration Center, Leavenworth, Kansas, 1 FRLA No. 111 (1979); U.S. Customs Service,

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[14/] It is noted that the Respondent did not defend on the ground that statements made by Dr. Feldberg were protected expressions of personal views or opinions within the meaning of Section 7116(e) of the Statute. In any event, this Section by its terms, would not be applicable in cases wherein the statements made reflect threats or coercive elements.

Region IV, Miami, Florida, 1 FLRA No. 108 (1979). The element of discriminatory motivation needed to establish a Section 7116(a)(2) violation may be inferred from circumstantial evidence. U.S. Customs Service, Region IV, Miami, Florida, supra; Veterans Administration Center, Leavenworth, Kansas, supra.

The Authority has also held that in examining discrimination where an employee asserts a facially lawful business justification for the alleged discriminatory action, it would examine such cases through an analysis similar to that used by the United States Supreme Court in Mt. Healthy City School District Board of Education v. Doyle, 529 U.S. 274 (1977) (involving conduct protected by the United States Constitution). The Authority stated that the burden is on the General Counsel to make a prima facie showing that the employee had engaged in protected activity and that the prohibited conduct was a motivating factor in the administrative action taken by the agency. Once this is established, the agency may avoid responsibility only by showing by a preponderance of the evidence that it would have reached the same decision or taken the same action even in the absence of protected activity. Internal Revenue Service, Washington, D.C., 6 FLRA No. 23 (1981); Veterans Administration, Medical and Regional Office Center, White River Junction, Vermont, 6 FLRA No. 68 (1981); Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region, 9 FLRA No. 11 (1982), 9 FLRA 73.

The record discloses a lack of any credible and persuasive reason for Dr. Feldberg's negative comments concerning Dr. Lefko's performance, and further, that reasons given for making such comments were merely a pretext to camouflage union animus. The basis for these findings is revealed by the statements made by Dr. Feldberg to Dr. Nemzoff, as they indicate an intent to deprive Dr. Lefko of future consideration for promotion because of Dr. Lefko's Union activities; by the pattern of heated labor-management disputes involving Dr. Lefko and Dr. Feldberg prior to Dr. Feldber'g evaluations; by the conflict evident between Dr. Feldberg's clear recognition of Dr. Lefko's desire for career advancement, and his subsequent reliance upon the opposite contention that Dr. Lefko was not interested in promotion; by the documented record evidencing Dr. Lefko's prior satisfactory performance in pertinent areas of interest right up to Dr. Feldberg's June 5, 1981 comments; by Dr. Allen's total disagreement with Dr. Feldberg's appraisals of Dr. Lefko; by the apparent lack of opportunity for Dr. Feldberg to observe Dr. Lefko's performance; by Dr. Feldberg's effort to evaluate Dr. Lefko for failure to perform functions which did not relate to his work as a staff member in the Department of Psychiatry; by Dr. Feldberg's insistence upon the inclusion of false and misleading information pertaining to Dr. Lefko's career goals in Dr. Feldberg's revised comments concerning Dr. Lefko's performance; and lastly by other contradictions and inconsistencies in Dr. Feldberg's testimony.

The record clearly shows by a preponderance of the evidence that Dr. Lefko was engaging in protected Union activities, that the Respondent, through Dr. Feldberg, had knowledge of such activity; and that Dr. Feldberg's comments were generated solely by anti-union animus.[15] Even assuming that Dr. Lefko's engaging in protected union activity was only one motivating factor, the record reflects no basis for a finding, by a preponderance of the evidence, that Dr. Feldberg would have made the same performance appraisals even in the absence of Dr. Lefko's protected union activity. Accordingly, it is concluded that the Respondent's conduct with respect to the execution of the two performance appraisals violated Sections 7116(a)(1) and (2) of the Statute.

Having found that the Respondent violated Section 7116(a)(1) and (2) of the Statute, it is recommended that the Authority issue the following Order:[16]

ORDER

Pursuant to Section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations, and Section 7118 of the Statute, the Authority hereby orders that the Veterans Administration Medical Center, Lebanon, Pennsylvania, shall:

1. Cease and desist from:

    (a) Interfering with, restraining, or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute by conveying to any bargaining unit member or members, in any conversation, the impression that bargaining unit members will be denied promotion if they participate in protected union activities at the Veterans Administration Medical Center, Lebanon, Pennsylvania.

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[15] Internal Revenue Service, Boston District Office, Boston, Massachusetts, and Internal Revenue Service, Andover Service Center, Andover, Massachusetts, 5 FLRA No. 96 (1981).

[16] As a part of the remedy requested counsel representing the Charging Party states that Dr. Feldberg should be removed from any supervisory position in the Veterans Administration, and that the Charging Party should be awarded attorney fees. No explanation or basis for granting either of these remedies is reflected in the record, and neither is specifically authorized by statute or regulation. However, it is unnecessary to determine whether either would be otherwise appropriate under the broad discretion provided the Authority under Section 7118(a)(7)(D) of the Statute because it is clear that they would not, within the context of this case, and the meaning of 7118(a)(7)(D), be necessary or appropriate for the purpose of effectuating the purpose of the Statute.

(b) Discouraging membership in a labor organization by including negative comments in performance appraisals of Dr. Andew Lefko because of Dr. Lefko's activities on behalf of American Federation of Government Employees, Local 1966, AFL-CIO.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action:

(a) Remove or expunge from Dr. Andrew Lefko's Veterans Administration personnel files, all copies of Proficiency Reports relating to the period June 9, 1980 to June 9, 1981, which reflect comments made by Dr. Murray Feldberg on or about June 5, 1981, and on or about August 28, 1981.

(b) Post at its facilities at the Veterans Administration Medical Center, Lebanon, Pennsylvania, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the Veterans Administration Medical Center, Lebanon, Pennsylvania, and shall be posted and maintained by him for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. The Director shall take reasonable steps to ensure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region II, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Louis Scalzo
LOUIS SCALZO
Administrative Law Judge

Dated: August 20, 1982
Washington, D.C.

[2-CA-20001]

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute by conveying to any bargaining unit member or members, in any conversation, the impression that bargaining unit members will be denied promotion if they participate in protected union activities at the Veterans Administration Medical Center, Lebanon, Pennsylvania.

WE WILL NOT discourage membership in a labor organization by including negative comments in performance appraisals of Dr. Andew Lefko because of Dr. Lefko's activities on behalf of American Federation of Government Employees, Local 1966, AFL-CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL remove or expunge from Dr. Andrew Lefko's Veterans Administration personnel files, all copies of Proficiency Reports relating to the period June 9, 1980 to June 9, 1981, which reflect comments made by Dr. Murray Feldberg on or about June 5, 1981, and on or about August 28, 1981.

____
(Agency or Activity)

DATED: ____________________ BY: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, Region II, whose address is: Room 24-102, 26 Federal Plaza, New York, New York 10278, and whose telephone number is: (212) 264-4934

[9-CA-20072]

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
SOCIAL SECURITY ADMINISTRATION,
BALTIMORE, MARYLAND

(Respondent)

and

Case No. 9-CA-20072

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

(Charging Party)

ORDER

The Administrative Law Judge issued his Decision and Order in the above-entitled proceeding on August 2, 1982, finding that the Respondent had not engaged in any unfair labor practices as alleged in the complaint, and recommending that the complaint be dismissed.

No exceptions to the decision were filed with the Authority within the time limit prescribed for such filing.

Therefore, in accordance with section 2423.29(a) of the Authority's rules and regulations, as amended (5 CFR § 2423.29(a) (1982)), the findings, conclusions, and recommendations in the decision of the Administrative Law Judge constitute, without precedential significance, the finding, conclusions, decision and order of the Authority, and all objections and exceptions thereto are deemed waived for all purposes.

Accordingly, the complaint is hereby dismissed.

For the Authority.

Issued, Washington, D.C., September 30, 1982

James J. Shepard

James J. Shepard, Executive Director

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF HEALTH AND HUMAN SERVICES
SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO

Charging Party

Case No. 9-CA-20072

Ann Segars
For the Respondent

Vince Morgante
For the Charging Party

Patricia Jeanne Howze, Esq.
For the General Counsel

Before: FRANCIS E. DOWD
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, herein referred to as the Statute, 92 Stat., 1191, 5 U.S.C. § 7101, et seq. It was instituted by the Acting Regional Director of the Ninth Region of the Federal Labor Relations Authority by the issuance of a Complaint and Notice of Hearing dated January 26, 1982. The Complaint was issued following an investigation of an unfair labor practice charge filed on November 19, 1981 by American Federation of Government Employees, Local 3172, AFL-CIO, herein referred to as the Union, Charging Party or AFGE. The Complaint alleges that Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, herein referred to as Respondent or SSA, violated Section 7116(a)(1) by interrogation of an employee concerning her union membership and activities. Respondent filed an Answer denying any violation of the Statute. The only issue to be resolved is whether the interrogation occurred, as alleged in the Complaint. Resolution of this issue hinges upon making a credibility resolution between the only two witnesses at the hearing.

A hearing was held in San Francisco, California, at which time the parties were represented by counsel and afforded full opportunity to adduce evidence and call, examine and cross-examine witnesses and argue orally. Briefs filed by the General Counsel and Respondent have been duly considered.

Upon consideration of the entire record in this case, including my evaluation of the testimony and evidence presented at the hearing, and from my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommended order.

Findings of Fact

1. At all times material herein, the Union has been, and is, a labor organization within the meaning of 5 U.S.C. 7103(a)(4) of the Statute.

2. At all times material herein, Respondent has been, and is, an agency within the meaning of Section 7103(a)(3) of the Statute.

3. On August 30, 1979, AFGE was certified as the exclusive representative of a national consolidated unit consisting of, among other units, the following unit:

> All General Schedule (GS) employees in Region IX (San Francisco Region), Bureau of District Office Operations, Social Security Administration, Department of Health and Human Services, excluding management officials, supervisors, guards, professionals, employees engaged in Federal personnel work in other than a purely clerical capacity, NYC, WIN, Work-Study employees and employees employed in the District Office at Redding.

Cheryl Albon is a bargaining unit employee at the Sutter Street Office in downtown San Francisco. She is a Claims Technician and has been employed by SSA since 1976.

4. At all times material herein, Kevin Murphy, occupied the position of Branch Manager, Daly City Branch Office of Respondent. He has been and is a supervisor or management official within the meaning of Section 7103(a)(10) and/or (11) of the Statute, respectively, and is an agent of Respondent.

5. On November 5, 1981, Albon went to Respondent's Daly City Branch Office for a previously scheduled job transfer interview. She was first interviewed by Peggy Straman, a supervisor. She was then interviewed by Kevin Murphy, for about one-half hour. Murphy had agreed to interview her after being told by District Manager Al Foss that Albon was interested in a transfer. According to Murphy, he had no vacancy at that time for a Data Review Technician but he felt it was a good idea, by way of advance planning, to get to know her as a possible transfer in the future.

During the interview, Murphy questioned Albon about her reasons for making a transfer and was told that her commuting time to work would be substantially decreased, child care would be easier to arrange, and transportation would be more convenient since her husband worked at the Post Office. He did not ask her if she was married. He asked her whether she had been supervised by individuals whom he knew personally as a result of his previous assignment to the Sutter Street Office. It was in connection with this latter inquiry that Albon volunteered that she had always got along well with management and had never filed a grievance.1/ Murphy was somewhat taken aback by this statement because it appeared as if Albon thought this information would impress him and help her to obtain a transfer. In fact, he felt that her remark was a bit peculiar and somewhat disruptive to the conversational flow he had established. Nevertheless, he proceeded to inquire into other areas.

Although Murphy could have obtained through administrative channels Albon's leave records and performance evaluations, he discussed these very important subjects also. In this way, Albon had an opportunity to explain her low sick leave balance which she said was about 10 hours. After the interview, Murphy obtained her records and checked with her supervisors about her performance and personal relationships with other employees. When discussing leave, Albon demonstrated what Murphy termed as a lack of flexibility, by stating that she had 30 hours of annual leave which she planned to take on specified dates. Apparently, Albon's remark was made in an adamant, belligerent manner indicating no room for compromise. Coming from an employee seeking a transfer, Albon's remark made a poor impresssion on Murphy.

1/ I credit Murphy's testimony that he did not ask Albon to explain why she had not filed any grievances.

In his testimony, which I credit, Murphy denied asking Albon about the Union, her membership therein, her activities on behalf of the Union, or whether she had filed any grievances. In deciding to credit Murphy rather than Albon, I am essentially making a credibility resolution based upon demeanor, plus an evaluation of the entire testimony of both witnesses. Murphy was open and relaxed on the witness stand and make a significant effort to respond precisely to the questions asked. He was cooperative and helpful in attempting to fully describe the interview from beginning to end. His version of what happened is more believable than that offered by Albon, who appeared to be speaking by rote. In deciding not to credit Albon, I am not relying upon any alleged inconsistencies between what she told Murphy during her interview and what information he obtained thereafter by a review of her records.

Conclusions of Law

The credited testimony reveals no evidence of unlawful interrogation within the meaning of Section 7116(a)(1). Accordingly, the General Counsel has not sustained his burden of proof and I recommend that the Authority issue the following:

ORDER

That the Complaint in Case No. 9-CA-20072 be, and hereby is, dismissed.

Francis E Dowd
FRANCIS E. DOWD
Administrative Law Judge

Dated: August 2, 1982
Washington, D.C.

_ 3/17

Federal Labor Relations Authority

Washington, D.C. 20424

NUMBER 17

ADMINISTRATIVE LAW JUDGE DECISIONS REPORT*

October 28, 1982

UNFAIR LABOR PRACTICE CASE

Case Nos. 1-CA-512, 1-CA-604, 1-CA-610, 1-CA-621, 1-CA-622, 1-CA-643 and 1-CA-675 (October 22, 1982)

Veterans Administration Medical Center, Canadaigua, New York and American Federation of Government Employees, Local 3306, AFL-CIO

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* THIS REPORT SERIES INCLUDES DECISIONS AND ORDERS OF FLRA ADMINSITRATIVE LAW JUDGES TO WHICH NO EXCEPTIONS WERE FILED WITH THE AUTHORITY WITHIN THE PRESCRIBED TIME LIMIT. IN ACCORDANCE WITH SECTION 2423.29(e) OF THE AUTHORITY'S RULES AND REGULATIONS, AS AMENDED (46 FED. REG. 40674 (1981)), THE FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS IN SUCH ALJ DECISIONS CONSTITUTE, WITHOUT PRECEDENTIAL SIGNIFICANCE, FINDINGS, CONCLUSIONS, DECISIONS AND ORDERS OF THE AUTHORITY.

Y 3.F31/21-3:

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION
MEDICAL CENTER, CANANDAIGUA,
NEW YORK

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3306, AFL-CIO

Charging Party

Case Nos: 1-CA-512
1-CA-604
1-CA-610
1-CA-621
1-CA-622
1-CA-643
1-CA-675

ORDER

The Administrative Law Judge issued his Decision in the above-entitled proceeding on December 9, 1981, concluding, in part, that the Respondent had engaged in certain unfair labor practices alleged in the complaint and recommending that the Respondent be ordered to cease and desist therefrom and take certain affirmative action.

Since no timely exceptions to the Judge's Decision were filed,*/

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*/ While the Respondent filed exceptions to the Judge's Decision, they were not timely under the Authority's Rules and Regulations. Thus, section 2423.26(c) provides in part that "any exception to the . . . Judge's decision . . . may be filed by any party with the Authority within twenty-five (25) days after service of the decision . . . ." Since the Judge's Decision was served by mail, five days must be added to the prescribed period. Moreover, section 2429.21 of the Authority's Rules and Regulations provides that "[w]hen this subchapter requires the filing of any paper, such document must be received by the Authority . . . before the close of business on the last day of the time limit . . . for such filing . . . ." (Emphasis added). Accordingly, as the Judge advised the parties in transmitting his Decision to them on December 9, 1981, "[a]ny such exceptions must be filed with the Authority in Washington, D.C., on or before January 8, 1982." Inasmuch as the Respondent's exceptions were received by the Authority on January 11, 1982, they were untimely.

and in accordance with section 2423.29 of the Authority's Rules and Regulations, as amended, the Judge's findings, conclusions, and recommended order constitute, without precedential significance, the findings, conclusions, decision and order of the Authority, and all objections thereto are deemed waived for all purposes.

Accordingly, the Respondent shall cease and desist from the violations found by the Judge and take the affirmative actions set forth in the Order.

For the Authority.

Issued, Washington, D.C., October 22, 1982

James J. Shepard

James J. Shepard, Executive Director

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

VETERANS ADMINISTRATION
MEDICAL CENTER, CANANDAIGUA,
NEW YORK

Respondent

and

Case Nos: 1-CA-512
1-CA-604
1-CA-610
1-CA-621
1-CA-622
1-CA-643
1-CA-675

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3306, AFL-CIO

Charging Party

CERTIFICATE OF SERVICE

Copies of the Order of the Federal Labor Relations Authority in the subject proceeding have this day been mailed to the parties listed below:

Mr. John C. DiNoto and
Ms. Melissa Baltz
Office of the District Council
Veterans Administration Regional Office
111 West Huron Street
Buffalo, New York 14202

Mr. Gerard M. Greene
Counsel for the General Counsel
Federal Labor Relations Authority
441 Stuart Street
Boston, Massachusetts 02116

Mr. Keith Livermore
American Federation of Government
Employees
305 Broadway, Suite 806
New York, New York 10007

OALJ-82-22

[1-CA-512 et al.]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

VETERANS ADMINISTRATION MEDICAL
CENTER, CANANDAIGUA, NEW YORK

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3306, AFL-CIO

Charging Party

Case No.: 1-CA-512
1-CA-604
1-CA-610
1-CA-621
1-CA-622
1-CA-643
1-CA-675

John C. DiNoto, Esq.
Melissa Baltz, Esq.
For the Respondent

Gerard M. Greene, Esq.
For the General Counsel

Keith Livermore
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to an Order Consolidating Cases, a First Amended Complaint and Notice of Hearing issued on April 15, 1981 by the Regional Director for the Federal Labor Relations Authority, Boston, Massachusetts Region, a hearing was held before the undersigned on June 17, 1981 at Canandaigua, New York.

This proceeding arises under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 et seq. (herein called the Act). On October 15, 1980 a charge was filed in Case No. 1-CA-512 filed by the American Federation of Government Employees, Local 3306, AFL-CIO (herein called the Union) against the Veterans Administration Medical Center, Canandaigua, New York (herein called Respondent or the Employer). Thereafter between December 24, 1980 and February 24, 1981 successive charges herein were filed by the Union against Respondent in Case Nos. 1-CA-604, 1-CA-610, 1-CA-621, 1-CA-622, 1-CA-643 and 1-CA-675.

The First Amended Complaint, with respect to the aforesaid cases, alleged in substance as follows:

a) On or about August 13, August 27, and September 11, 1980, Respondent threatened an employee with disciplinary action because of his union activity in violation of Section 7116(a)(1) of the Act.

b) On or about September 20, 1980 Respondent unilaterally changed conditions of employment by issuing Station Memorandum No. 80-48 without notifying the Union and affording it the opportunity to request bargaining over the change and/or its impact and implementation - all in violation of Section 7116(a)(1) and (5) of the Act.

c) In or about October, 1980, Respondent unilaterally changed conditions of employment by assigning social workers the duties of writing discharge summaries without furnishing the Union notice and an opportunity to bargain such change and/or its impact and implementation - all in violation of Sections 7116(a)(1) and (5) of the Act.

d) In or about November, 1980 Respondent unilaterally established different working conditions for a registered nurse to function as a clinical nurse specialist without notifying the Union and/or affording it an opportunity to bargain as to the change and/or its impact and implementation - all in violation of Section 7116(a)(1) and (5) of the Act.

e) On or about November 13, 1980 and December 8, 1980 Respondent failed and refused to negotiate the implact and implementation of its decision to renovate certain buildings at its Canandaigua locations - all in violation of Sections 7116(a)(1) and (5) of the Act.

f) On or about November 13, 1980 Respondent bypassed the Union and dealt directly with unit employees by soliciting volunteers for reassignment.

g) On or about December 14, 1980 respondent unilaterally changed conditions of employment by renovating certain buildings at its Canandaigua, New York location without affording the Union an opportunity to bargain regarding the impact and implementation of its decision.

h) On or about December 19, 1980 Respondent held a formal discussion with unit employees without giving the Union an opportunity to be represented at such discussion - all in violation of Sections 7116(a)(1),(5) and (8) of the Act.

i) On or about December 19, 1980 Respondnet unilaterally changed conditions of employment by recalling a "beeper" or "pager" assigned to a Union official without notifying the Union and affording it an opportunity to bargain regarding such change and/or its impact and implementation - all in violation of Section 7116(a)(1) and (5) of the Act.

j) On or about January 7, 1981 Respondent refused to provide the Union , as requested on December 30, 1980, a copy of a "Prioritization of Training" memorandum which was necessary and relevant for the Union to fulfill its representational duties for employees - all in violation of Sections 7116(a) (1), (5) and (8) of the Act.

Respondent's Answer herein denied the aforesaid allegations and the commission of any unfair labor practices.

All parties were represented at the hearing.[1] Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter briefs were filed with the undersigned which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings, conclusions and recommendations:

Findings of Fact

1. At all times material herein the Union or the American Federation of Government Employees, AFL-CIO has been and still is the exclusive representative of Respondent's professional employees, as well as its registered nurses assigned as staff nurses and instructors in nursing service, and nurse practitioners and clinical nurse specialists.

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[1] At the hearing General Counsel's motion to amend the First Amended complaint was granted in the following respects. (A) by adding the words "and or unspecified refusals" after the words "disciplinary action" in paragraph 12(a); (B) by designating paragraph 11 as 11(a) and adding paragraph 11(b) which recites that up to February 27, 1980 the Union was the exclusive representative of registered nurses (staff) and instructors, nurse practitioners and clinical nurse specialists of Respondent; (C) in paragraphs 13(a) strike out the words "such changes and/or" and insert the word "over" after the word "bargain"; (D) in paragraphs 13(g) strike out the words "such changes and/or". By virtue of the last two amendments, General Counsel no longer alleges the decisions to make such changes set forth in 13(a) and (g) were bargainable.

2. (a) On August 13, 1980[2] Gary Yax, an occupational therapist (OT) and steward of the Union, met with Dr. Salazar, chief of Rehabilitation Medical Services, and Ken North, acting chief of Occupational Therapy. After being informed by Salazar that OT people would be rotated in their jobs, Yax stated he thought the matter should be negotiated. Although Salazar said it is not negotiable, the Union steward replied that management should get together with the Union. Whereupon the Doctor retorted that Yax was blocking his rotation plan; that the employee was the main obstacle.

(b) Two weeks later the same parties met again and discussed the same subject. Salazar remarked that the rotation would take place among the OT's; that the employees should get together with North and come up with a rotation schedule; that if they didn't do so, the RMS office would, and "it would not be pleasant". It was further stated by Salazar that Yax and two other OT's were deficient in their job description, and that OT Gallagher would be audited in her job description.

(c) A third meeting among the same individuals occurred a few weeks later. Yax informed management that he told the unit members of the plan to implement the rotation. Salazar replied that Yax was a prima donna; that it did not concern the bargaining unit; that he wanted Yax to do the rotation scheduling. When Yax commented he couldn't estimate how long it would take to do it, Salazar said the employee was resistful and resentful toward him. The Doctor further stated the day of reckoning would come for the OT's. Finally, Salazar remarked to North that Yax was a tough nut to crack and North should explain things to the employee.

3. (a) In late September or early October Brooke Brewer, social worker and Union representative of professionals, was informed by several social workers that they understood the social workers would be doing the discharge summaries.[3] On several occasions, between late September and February, 1981, Brewer spoke to Anna Portka, chief of social work service, regarding this subject matter. Portka voiced objection to having the social workers doing the summaries, and stated she would not have her staff do this task.

(b) Prior to late October only one of the 15-20 social workers had been assigned to draft discharge summaries. When several workers refused to, or were not writing the summaries, management held a meeting on December 19 to ascertain the reasons therefore. In attendance thereat were Dewayne Robertson, Director of the medical center, Rexford Salisbury, assistant director of the medical center, Richard Lang, assistant chief of social work service, and social workers Judy Melino and Jerry Buzan. No notification was given to the Union herein of the meeting. Lang testified that at the date of the meeting two social workers were preparing the summaries. Salisbury asked the social service workers why they refused to write the summaries. Melino replied that their supervisor, Portka, ordered them not to do so. Whereupon Salisbury stated he was Portka's boss and was ordering these employees, as well as all social workers, to write them. Melino asked that the order be in writing, but the assistant director refused. After this individual agreed to draft the summaries, Buzan remarked he had no experience doing this task. The management official stated that Respondent would set up a training program for him beforehand.

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[2] All dated hereinafter mentioned occur in 1980 unless otherwise specified.

[3] A discharge summary sets forth the patient's status, including the reason for admission, diagnosis, treatment and discharge plans.

(c) Since the aforementioned meeting both Melino and Buzan, in addition to four other social workers, have been writing discharge summaries as part of their regular duties. Time consumed in so doing has been between 20-90 minutes for each summary.[4]

4. (a) In the summer of 1980 Douglas Nather, President of the Union and an employee at the medical center, spoke to Director Robertson regarding the fact that he was unable to receive messages. Nather explained that he worked in a patient care area where no phone was located; that people were unable to reach him, and that he received numerous telephone calls each day in regard to Union business. The employee requested a telepager to thus ease the workload of the secretaries. At the suggestion of Robertson, the union official wrote a memo, dated August 21, to H. Tremblay, chief of Medical Administration Services, regarding his request. Nather stated he found it difficult to be responsive to communications from the hospital, as well as his union constituency, due to his ambulatory activities. He thus asked for a telepager which was issued to him in October.

(b) Between the date of issuance and December Rather used the telepager or "beeper" for communicating with hospital officials or aides, as well as discussing labor-management problems involving other employees. In December Tremblay met with Nather and asked him to turm in the pager. Respondent's official stated the item was no longer a priority; that the hospital needed a reserve "beeper" for emergency communications. He also remarked that its issuance was an administrative mistake. When Nather objected and pointed out that a representative of the Service Employees International Union, Local 200 (SEIU) had the use of the pager, Tremblay said it was an administrative mistake and the SEIU representative would not be keeping the pager.[5] Thereafter Robertson phoned Nather and asked him to turn it in, mentioning that the pager was no longer a priority. Nather complied with the director's request and relinquished the item.

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[4] Melino testified she did one summary each week, consuming 20-45 minutes. Buzan testified he wrote a summary every week and a half, consuming 90 minutes thereat.

5. (a) In November there were 17 nurses assigned to Building 37 at the medical center. Except for head nurse Constantine and Union President Douglas Nather, all the nurses thereat worked a rotating schedule on three shifts. Approximately nine nurses rotated weekends and days off. Since four nurses were on duty on a given weekend or holiday, the nurses were off from duty every other weekend.

During November Respondent assigned staff nurse Suzanne Leicht, who was one of the nurses in Building 37 on a rotational schedule, to the day shift (Monday - Friday, 7:30 a.m. to 4:00 p.m.). Although she retained her title of staff nurse, Leicht was transferred in order to train her as a clinical specialist and fill a vacancy in that position. After the shift transfer Leicht did not work holidays or weekends, and she did not rotate her scheduled hours. She did not receive pay differential which was paid her previously if she rotated to an evening shift or worked weekends.

(b) Since no notification was given by the employer to the Union, Nather spoke to Constantine regarding the assignment. He inquired why Leicht did not work holidays or weekends as the remaining 14 nurses. Constantine replied that Respondent wanted Leicht on administrative work. Nather objected to this nurse receiving preferential treatment, and he also stated the matter should have been discussed with the bargaining representative. The union official also protested the transfer to nurse coordinator Simon. Nather stated that Leicht should have the title of clinical specialist or be returned to her original schedule. The supervisor refused this demand, commenting that the nurse was not doing specialized work.

(c) Nather also wrote to William C. Reiter, chief of Nursing Service, protesting the transfer of Leicht and her preferred schedule. The union official also referred to the fact that Respondent had not negotiated the impact of the assignment on other nurses. He requested that Leicht be returned to the rotating schedule or be appointed to the clinical specialist position.[6] On December 22 Nather, Reiter, and Simon met to discuss the matter. Reiter insisted the subject was not negotiable. He took the position that Leicht was not performing specialized work and management had the right to assign employees to the day shift. In January, 1981 Nather conferred again with Reiter regarding the assignment. Although the union representative repeated his objections thereto, Reiter continued to insist that Respondent retained the right to take that action. Leicht left her employment in March, 1981.

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[5] A pager which had also been issued to SEIU representative Charles Fleury was withdrawn in late 1980. It had been given to him several years earlier, and the assistant service chief told Fleury it was recalled due to his change of duties.

(d) In respect to the effect of the transfer upon the remaining nurses,[7] record facts show these individuals absorbed the work performed by Leicht on weekends, holidays or off-shift work. Since the nurses in Building 37 worked every other weekend, and Leicht continued on the day shift for about four months (till her termination), the absorption period amounted to two months. Record facts show that, as a result of Leicht's assignment to the day shift, several people had to work about four weekends during said period to absorb the vacancy left by said assignment. Prior to November, 1980 Leicht received a pay differential if she rotated to an evening staff (6:00 p.m. to 6:00 a.m.) or worked on a Sunday; after this date she received no pay differential unless working said hours.[8]

6. (a) A station memorandum, issued by Respondent on September 30, 1979, set up a training and education program for the development of employees and students from affiliated schools. It provided for a Hospital Education Committee and a Subcommittee for Professional Education. Under date of September 30 Respondent issued Station memorandum No. 80-48 which established a Travel and Education Committee in connection with a Post-Graduate and In-Service Training Program. The purpose, as stated therein, was to maintain and improve patient care through continuing education and training. The 1980 committee replaced

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[6] A minimum of two years of clinical practice beyond graduate work is required to become a clinical nurse specialist. There is no difference in pay between that position and the staff nurse. Leicht did not have the qualifications to be designated as clinical nurse specialist.

[7] It is not contended by the General Counsel, nor does the record establish, that moving Leicht to the day shift adversely impacted upon this employee.

[8] Record facts show that a minimum of two years of clinical practice beyond graduate work is required to become a clinical nurse specialist; that there is no difference in pay between that classification and a staff nurse. Leicht, however, lacked the experience to be classified as clinical nurse specialist.

both of the former committees established the previous year. The Union did not receive formal notification of the change, but a copy was put in chief steward Dennis Alder's mail box in early October. Under the new plan in Station Memorandum No. 80-48 priorities were declared in respect to Respondent's funding of educational proposals requested by employees. Three such priorities for funding were established thereunder.

(b) At a labor-management meeting in October the Union apprised Respondent of the fact that it had not been informed of the change in committees; that management did not meet its obligation to negotiate the changes and their impact upon employees. Assistant Medical Director Salisbury replied that no policy change was effected - just a different description of the committee. Further, he stated there was no obligation to bargain over same.

(c) Prior to the 80-48 memorandum there was no priority system in respect to funding attendance by employees at conferences. Requests for attendance thereat were handled on a first-come, first-serve basis, and the committee made a recommendation to the Director regarding approvals. Under the old policy the Subcommittee in Educationwould recommend one-half the per diem for an individual going to a conference. Further, the Respondent would pay the travel expenses, while the individual would stand the tuition expense. Under the new system, Dr. Robert E. Blake, chief of podiatry, requested in November that he be funded to attend the NY State Podiatry Association meeting. He requested $630 as expenses therefor. The Training and Education Committee declared his request was a priority 3 and granted him $100. Blake did not attend the conference.

(d) A meeting was held in December regarding the new training plan. It was attended by Dr. Robert Atkins, psychiatrist and Chairman of the Committee, program analyst Robert Beller, Reiter, Salisbury, and Alder as an observer. Beller mentioned that they were operating under the priority system which had been implemented; that each department had been visited and asked to list its needs for the coming year regarding training-education, and each member of the Committee would receive a copy thereof. Although Beller agreed to furnish Alder a copy of the training prioritization, Beller informed the steward later that management would not permit him to do so.

(e) By letter dated December 30 addressed to the Director, Nather requested Respondent to negotiate the "substance, impact and implementation" of Station Memorandum 80-48. It was stated therein that the Union considered management's action to be a change in working conditions. Further, it was requested that the Director rescind the memo pending negotiation. In a separate letter, dated December 30, Nather also asked for a copy of the Prioritization of Training Plans prepared by Beller. The Director replied to both letters in separate memos dated January 7, 1981. He rejected the request to rescind Memorandum No. 80-48, stating it concerned a subject about which management was not obliged to bargain. Robertson also stated that the Memorandum involved no change in working conditions. He refused to send the Union a copy of the Prioritization of Training Plans on the ground that it is an internal management paper and that the Union's role in the committee was deemed to be an observer.

(f) In a memorandum dated February 2, 1981 addressed to members of the Travel and Education Committee, Beller requested that attached training needs be ranked in order of importance so as to establish priorities therefore. Thereafter a Medical Center Training Plan, 1981 was prepared by Respondent which ranked the training needs in regard to funding, and the Committee was required to consider the expressed priorities.

7. (a) On November 13 staff nurse Faye Jensen, who was acting as executive vice-president of the Union for nursing, appeared at the office of Reiter pursuant to his request. The chief of nursing service advised the union representative that changes would occur in the psychiatric nursing set-up due to building renovations. The plan, as he explained, called for closing Building 6 and moving patients and part of the nursing staff to Building 4B. Also, Building 1C would open and part of the staff (ten nurses) in Building 1B would be moved to 1C. All of the nursing staff in Building 6, Reiter informed Jensen, would transfer to Building 4B except for one registered nurse - and those nurses in Building 4A would remain there save for three such individuals.

Jensen inquired which nurses would be involved in the move, but Reiter refused to disclose the names until the nurses were notified. She also asked how the selection would be made, and Reiter replied that the head nurse and the nurse supervisor would make that decision. The union official was further advised that seniority would not govern; that management wanted both experienced and non-experienced people at a particular location. Reiter told Jensen that employees could submit requests in writing for reassignment to other areas and Respondent would try to meet them. If unable to do so, management would accord them priority for reassignment when vacancies occur at a later date. Some nurses, Reiter explained, had to be assigned to a medical unit, and they would have the opportunity to be reassigned to a psychiatric unit.

The union official then expressed the following additional concerns regarding the move: (1) since the schedule in Building 1B was different from 1C, the days off would be different, and the nurses might not get the same holidays as requested; (2) a problem might arise as to uniform allowances. Thus, nurses in the psychiatric ward could receive an allowance and wear uniform - or sign a waiver of the allowance and wear street clothes. But in the medical area a uniform was required, and if a waiver were signed, there would not be an allowance for the uniform for a year - the waiting period after signing such waiver.

(b) Under date of November 20 chief steward Alder addressed two separate memos to the chief of personnel. In one instance he requested, on behalf of the Union, that Respondent negotiate the substance, impact and implementation of the "proposed reassignment of nursing service employees due to renovation project." In the other memo Alder requested the negotiation of "reassignment and staffing changes due to the opening of an additional nursing unit (1C)." By letter dated November 21 Jensen notified Reiter that the Union requested a copy of the merger plan involving the different buildings; that the Union desired to be advised of the planned implementation and be furnished an impact statement. These documents were not furnished. On November 28 Respondent published a list of nurses and assistant nurses to be reassigned, and noted therein the building assignments.

(c) On December 5 a meeting took place between management and the Union regarding the impending move and reassignments. In attendance were Nather, Jensen and Alder on behalf of the charging party - Reiter and William Wilson, chief of Personnel, representing Respondent. Reference was made by the union representatives to the same concerns expressed by Jensen a month earlier. In respect to the method of selecting personnel for reassignment, the union officials suggested it be done on a voluntary basis; then, if there were no volunteers, seniority should be the criterion used in the selection. As to holidays, the union representative requested that the same schedule continue so that nurses would receive the holidays as expected. It was further proposed by the Union that those nurses assigned to a uniform type building receive an allowance therefor,9/ and if they returned to a non-uniform building the non-uniform status be applicable immediately and not a year later. Finally, it was suggested by the Union that psychiatric nurses be given preference to return, if a vacancy occurred, to their unit after being displaced. On the part of management, Reiter told the union officials that the matter was not negotiable; that it was unfortunate the reassignment caused inconveniences but management had the right to reassign individuals where needed.

(d) By letter dated December 8 Wilson wrote Nather in regard to the requests by the Union to negotiate the impact and implementation of the reassignment and staffing changes due to the renovation project. Wilson reiterated management's right to assign work to employees and determine the numbers regarding positions assigned, as well as the methods and means of performing work. He indicated the basis used for selecting individuals for reassignment, and stated that management did not consider any adverse impact would result to unit members. Requested leave would, he remarked,

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9/ The uniform allowance was not a problem for nurses who moved from Building 6 to 4.

remain unchanged insofar as possible; reassignment was not permanent and nurses could request reassignment to another unit. Wilson concluded by commenting that if the Union determines that adverse effects result from the move, which were not considered at the November 13 meeting, management should be advised in writing so they could be discussed between the parties.

(e) Reiter wrote Jensen on December 8 regarding the consolidation of Buildings 4 and 6, stating that no written plan was developed as to it. Further, he stated that "any seeming impact on professional nurses must be an employee determination,[10] thus I cannot supply you with an impact statement." Reiter also remarked that Jensen, at the November 13 meeting, appeared to agree as to the criteria for selecting nurses to be reassigned. In a reply memo dated December 10 Jensen disabused Reiter of the notion that she agreed to the criteria, and she advised him that no agreements were made at said meeting since it was merely an informational session.

8. Commencing on December 14 the nurses were reassigned in accordance with the consolidation plan. Employees were notified in advance although no notification was given to the Union. One full-time and two part-time nurses in Building 4 if moved to 1B - from psychiatric to medical areas; a nurse in Building 6 (psychiatric) moved to 1B. None has returned. By reason of the reassignment staff nurses relocated to Building 1C have been on a regular rotation schedule. In Building 1B rotations[11] occurred infrequently prior to December 14. Jensen also testified that since there were fewer nurses in Building 1C than 1B, she was not accorded a holiday on New Years as planned.

Conclusions

I. Alleged Threats By Respondent To Employee Based On Union Activity

It is contended by the General Counsel that supervisor Salazar, during his conversations with Union steward Yax, made various statements which were inherently coercive. As such, it is argued that these remarks fall within the parameter of the allegation in the complaint that the employee was threatened with discipline by reason of his unionism.

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[10] Reiter testified that, at the December 5 meeting, he told Jensen and Nather that the employees themselves would have to determine what, if any, impact resulted from the consolidation.

[11] Rotations took place before December 14 to cover vacation times; thereafter they occurred to accommodate management's having a nurse on duty at midnight.

I do not agree with this contention. While the comments by Salazar evinced frustration by the latter in dealing with Yax, I cannot conclude that the supervisor threatened the employee with discipline as a result of his union activities. The thrust of Salazar's discussion with the employee centered on his desire to have the occupational therapists (OT's) devise a rotational schedule. Yax countered by suggesting that the matter should be resolved with the Union. This suggestion was not embraced by Salazar who stated that the matter was non-negotiable and that the employee was blocking the rotation plan. While the doctor also said the 'day of reckoning' would come for the OT's, I do not conclude that such a remark was referable to the union activity of this or any other employee. This statement, albeit not explicit in its reference, exhibited Salazar's impatience and frustration in regard to implementing the rotation schedule. Without more, however, I am unable to draw an inference therefrom that Yax was thus threatened because of his activities on behalf of the Union herein.

Cases cited by the General Counsel in support of its position in this regard are inapposite. In Department of the Air Force, 35th Combat Support Group (TAC), Georgia Air Force Base, California, 4 FLRA No. 5, the employer refused to process an employee' grievance filed under a negotiated grievance procedure. A representative of management also told the employee he had no rights under said procedure. These remarks were held to have violated Section 7116(a)(1) of the Act since they discouraged or interfered with the right of the individual to file a grievance. This cited case involved no threat or coercive utterance, and in no way imposed possible disciplinary action as retaliation for unionism.[12] The coercive remark present in Navy Resale System, et al., 5 FLRA No. 42 is distinguishable from the statement made to Yax herein. In the Navy Resale case an implied threat of reprisal was found to exist when the supervisor stated to the employee that things would go much better if the latter came to him rather than the union president. Such a comment was deemed an attempt to restrain the individual's seeking assistance from the bargaining representative - and it was coupled with a threat unless the employee dealt with management. While the facts in the case at bar demonstrate that management deemed the rotation schedule to be non-negotiable, I do not construe his statements in that regard to be equatable with a threat - express or implied - to retaliate against Yax for his unionism.

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[12] Moreover, no threat was found to exist in the remarks of the school superintendent in Department of the Army, Fort Bragg Schools, 3 FLRA No. 57. His comment regarding not wanting collective bargaining in the school were held to have interfered with the right of teachers to engage in such activities. The factual situation is distinguishable from that presented herein.

Accordingly, I find and conclude Salazar's remarks to said employee did not constitute a threat under 7116(a)(1) of the Act as alleged in paragraph 12(a) of the Complaint.

II. Unilateral Change Regarding Training And Education By Issuing Station Memo 80-48 On September 30, 1980, And Refusal To Furnish Same To The Union

A. Respondent takes the position that (1) it was not required to negotiate the impact or implementation of Station Memorandum 80-48 and its contents regarding training and education, and (2) assuming arguendo, a change did occur by reason thereof, no substantial impact upon employees is shown to exist.

(1) The employer herein stresses the argument that the function of the committee, set up by the memorandum dealing with training and education of the staff, concerned patient care. As such, the program focused upon treatment of the patient rather than personnel practices or working conditions. In support of this contention, Respondent cites Veterans Administration Medical Center, Bath, N.Y. 4 FLRA No. 76. A Clinical Executive Board (CEB) was established by the Veterans Administration, in the cited case, to assure quality control of patient care programs through the assessment of activities, reports, and findings of all clinical committees. The Authority held that no obligation to bargain existed on the part of the employer since the CEB was not involved with working conditions but dealt solely with patient care, Respondent herein, in relying upon the cited case, adverts to the memo describing the Travel and Education Committee herein as indicating that the "fundamental purpose of the program is to maintain and improve the quality of patient care."

Notwithstanding the avowed purpose of the Committee herein, as so expressed, I conclude that in fulfilling its function this body necessarily made decisions affecting employees' working conditions. Thus, it is seen that the Committee passed upon requests by individuals to attend training conferences, and, in so doing, approved or disapproved funding requirements. In respect to the latter, decisions are made as to the amount of money which the individuals will receive for attending meetings. Further, based on a priority system established under the new plan, the Committee decided who would attend these conferences. Determinations of this nature involve, in my opinion, considerably more than patient care concerns. Since they affect the selection of employees who are entitled to avail themselves of the training sessions, as well as the monies to be paid them. I am constrained to conclude the Committee's role impacts upon conditions of employment.

Further, I reject Respondent's position that the Station Memo 80-48 merely reflects a different organization of a committee; that no change was effected in the policy regarding attendance at meetings. Prior to the said memorandum announcing the Training and Education Committee, requests for attendance at educational meetings were handled on a first-come first-serve basis. Under the new program a prioritization plan determined which individual should have priority to attend the conferences. Training needs were ranked by the Committee and priorities based thereon. Moreover, under the old arrangement the Subcommittee on Education - predecessor to the new Committee - recommended funding half the per diem for the trainee and his travel expense, while the individual paid the tuition expense. In at least one instance, [13] the individual (Dr. Blake) was awarded a stated sum of $100 for tuition to attend a clinical conference whereas he requested $630 to cover his expenses therefor. Accordingly, the employee did not attend the session. Based upon the foregoing, I am persuaded that the Training and Education Committee dealt with matters involving working conditions of the employees; that, moreover, changes in the plan regarding educational needs for its staff resulted from the establishment of this body pursuant to memorandum 80-48.

(2) It is also maintained by Respondent that no substantial impact upon employees resulted from the establishment of the new Committee. I disagree. While individuals attended conferences in accord with their timely requests in previous years, the new management set up a system of priorities determined by the Committee. The prioritization plan necessarily affects the staff since those who desire to attend conferences or meetings may not obtain approval. Thus, the training and education of individuals will depend upon considerations reached under the new system. Further, funding will not be uniform for attendance at the meetings, and employees may be called upon to finance their trips thereto to a greater extent than previously. The employer refers to Office of Program Operations, et. al. 5 FLRA 45 in contending that any impact herein is insubstantial. However, the cited case involved appointing as an acting supervisor a field representative. In that instance such appointment resulted in no adverse impact upon the other employees. No changes occurred in their work performance, and it did not appear that management's action impinged upon the employees in any significant respect. I view the situation in the case at bar to be substantially different since management's decision regarding the Committee affected the employee's training and educational functions.

In sum, I am satisified, based upon the evidence adduced herein, that the establishment of the Training and Education Committee was a change in respect to attendance by employees at conferences; that it was a negotiable matter [14] which impacted upon the working conditions of the staff. As such, Respondent was not free to unilaterally take such action, but was obliged to bargain with the Union in respect to the change. It is recognized by the Authority that regulations which alter established policies concerning conditions of employment, and which are issued unilaterally without affording the bargaining representative an opportunity to confer thereon, are violative of the Act. Pennsylvania Army and Air National Guard and ACT, 1 FLRA No. 38. Thus, I find and conclude Respondent violated Sections 7116(a)(1) and (5) of the Act by unilaterally changing its established committees and plans for the education and training of its employees.

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[13] While it is true, as Respondent argues, no other situations are shown which would establish a general change in regard to funding, it does appear that the Committee departed from its customary allowances.

(3) In respect to supplying the Union herein with a copy of the Prioritization of Training Plans, Respondent contends the memorandum sought was a management paper, and, further, that it has not been shown the data was relevant and necessary for the Union to exercise its representational duties.

It is now well established that an employer is required to furnish a bargaining representative requested information which is necessary and relevant to the fulfillment of the latter's functions on behalf of unit employees. In Department of Justice, Immigration and Naturalization Service, A/SLMR No. 902, it was contended by the respondent therein that both a Personnel Management Evaluation Report and a Plan were intra-managerial communications and privileged. These were sought by the union in connection with bargaining over a merit promotion plan. This contention was rejected by the Assistant Secretary, who concluded that the documents, which were formulated following a survey by a "tri-partite" team, contained information necessary and relevant to enable the union to fulfill its collective bargaining representative. In the case at bar, I likewise do not deem the prioritization training plans to be management [15] material which is shielded from disclosure. The plans for priorities in regard training and education concern the assignment of the staff to such conferences or meetings. As such, they deal with basic determinations which affect the approval or disapproval of such assignments, as well as the funding therefor. Since they must be adhered to by the Committee, they involve items about which the Union may well desire to bargain on behalf of the employees. As such, I also conclude that the data is presumptively necessary and relevant for the Union to fulfill its duties.[16] As stated in the Department of Justice Case, supra, "it is not required that the documents sought be the sole basis for proposals, or that they form the basis for fixed, final proposals, before they become necessary and relevant to the exclusive representative for negotiating purposes." Accordingly, I conclude Respondent herein flouted Section 7114(b)(4) and failed to fulfill its duty under that section in this regard. Therefore, I find that, in addition to violating Section 7116(a)(1) and (5) of the Act, Respondent also violated Section 7116(a)(8) thereof.

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[14] See Federal Employees Metal Trades Council of Charleston and Charleston Naval Shipyard, Charleston, S.C. FLRC No. 72A-46 involving the selection of personnel for training as proposed by the union. The Council concluded such proposals could well fall within the obligation to bargain under Section 11(a) of Executive Order 11491, as amended.

[15] Record facts do not support the finding that the information sought herein was intended solely for management personnel or that it was concerned with data in regard to particular individuals which might be privileged under the Privacy Act.

III. Unilateral Assignment To Social Workers Of Writing Discharge Summaries - And Alleged "Formal Discussion" With The Employees Without Giving The Union An Opportunity To Be Present

A. It is clear that, under the Act, an employer may make assignments to employees without bargaining as to the decision itself. (Section 7106 (a)(2)(A)). Nevertheless, it is obliged to bargain with the employees' representative regarding their impact and implementation. Although not disputing the obligation imposed upon management in this regard, Respondent maintains no change occurred in working conditions when the preparation of discharge summaries was given to social workers. Further, it insists that, if it be concluded that such did occur, no more than a minimal impact upon the social workers resulted therefrom.

Record facts show that, for the most part, the medical staff prepared the discharge summaries prior to 1981. In an effort to relieve the doctors from this task, management decided to utilize the social workers for making such reports. While it is true that one or two such individuals prepared the summaries in the past, it was management's intent in December to assign this duty to all social workers. Moreover, at least six new such individuals are now writing the summaries as part of their duties. This additional task represents, in my opinion, a change in working conditions since these social workers were not called upon to perform such duties in the past. With a few exceptions, record facts disclose that it was an established practice for those in the medical staff, other than social workers, to prepare the summaries. To impose an additional duty upon employees, which was not performed in the course of this job functions, constitutes a change in working conditions. In such an instance, an employee is required to negotiate with the collective bargaining representative as to the impact and implementation thereof. See Norfolk Naval Shipyard, Portsmouth, Virginia, 6 FLRA No. 22. I am persuaded that, in the case at bar, the assignment of this task to the social workers was a unilateral[17] change in their working conditions, and unless it can be concluded that no impact resulted therefrom, Respondent's action ran afoul of the Statute.

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[16] Respondent cites Veterans Administration Hospital, Lexington, Ky et. al. 3 FLRA 126 in support of its position that, where the record is barren of proof of relevance and necessity, no violations may be found. Apart from the fact that the record evidence may raise such a presumption, the cited case was dismissed because the requested document did not exist.

While it is true that an employer should not be obliged to negotiate as to impact of a change which is insignificant, I cannot agree with Respondent herein that the effect of the added assignment to the social workers was insubstantial. Nearly half of such employees are now preparing discharge summaries, whereas only one or two of them did so previously. Moreover, the preparation or drafting of such reports requires nearly one hour's average time. While each worker may write only one such summary per week, record facts disclose that the task was not of a routine or meanly nature. Thus, management agreed to train Buzan since he had no experience in this regard. Moreover, the data which is utilized to prepare the reports involve medical and diagnostic terms. Apart from the fact that the social workers were performing work which was not a portion of their established duties, the new assignment required additional time and study.[18] To some extent, at least, it imposed upon their regular tasks as social workers. In sum, I am constrained to conclude that there was a significant impact upon these employees by assigning them the preparation of discharge summaries; that Respondent's unilateral action in this regard was violative of Sections 7116(a)(1) and (5) of the Act.

(4) An issue is presented for determination as to whether the meeting on December 19 may be termed a "formal discussion" under 7114(a)(2)(A) of the Act so as to require Respondent to notify the Union and allow it to be represented thereat. While General Counsel so construes said meeting,

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[17] The evidence in the record would support a finding that the Respondent consulted the Union herein beforehand. Its action in this regard, as illustrated by Salisbury's comment that he was "the boss", belies any contention that the Union agreed to the assignment or that it was a bilateral action.

[18] Cf. Office of Program Operations, Field Operations, SSA, San Francisco Region, 5 FLRA No. 45 where the workload of employees assigned a task was not increased, and they were performing essentially the same duties as beforehand. No distinct "burden" or effect was shown to exist.

Respondent contends it was called to inform Melino and Buzan that they should perform the task of writing discharge summaries. Therefore, as argued by the employer, it cannot properly be described as a formal discussion under the statute.

As set forth in the above-mentioned section of the Act, an exclusive representative must be afforded an opportunity to be represented at any formal discussion between the agency and its employees regarding any grievance, or personnel policy or practice, or other general condition of employment. In the instant case Respondent's purpose in convening the session regarding December 19 was, in my opinion, not to discuss the assignment to the social workers of the preparation of discharge summaries. The Director called in the two employees because he learned thses workers were not performing the new duty recently assigned them. His intention was to ascertain the reason for this refusal.

General Counsel adverts to the case of Norfolk Naval Shipyard, Portsmouth, Virginia, supra, in support of its position that Respondent held a formal discussion with Melino and Buzan regarding the drafting of the summaries. In the cited case management met with crane operators to inform them that there would be a change in their duties, and the meetings were held to discuss the change in job duties and working conditions. The Norfolk Naval Shipyard case is inapposite in respect to the factual situation of the case at bar. The two social workers were not called to a meeting by Respondent to discuss the procedures or arrangements concerning the assignment of drafting discharge summaries, nor were they convened to inform them that they were being assigned this duty. The employer herein met with those workers merely to inquire why they were not performing the assignment itself. It has been held in the public sector that discussions by management with employees confined to an alleged failure to follow a rule or regulation was not a "formal" discussicn obligating an employer to afford union representation thereat. Department of the Navy, Naval Air Rework Facility, Alameda, California. A/SLMR No. 781 Sessions designed to discuss employees' shortcomings due their abusive language, or to consider a failure to follow a requirement regarding wearing uniforms at a military base, were not deemed to be discussions about general working conditions and hence not "formal" discussions. Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336. In the instant case Respondent's attempt to ascertain why Melino and Buzan were not performing their assignment differs from meetings at which management discusses the assigned work, its procedures or the implementation thereof. Cf. Rocky Mountian Arsenal, Denver, Colo. A/SLMR No. 933 where the employer met with individuals to discuss a reassignment and dwelt on the procedures in respect thereto. Thus, I conclude the meeting held on December 19 with the two social workers was not a formal discussion within the meaning of 7114(a)(2)(A) of the Act; that by failing to notify the Union herein for representation thereat Respondent did not violate Sections 7116(a)(1) and (5) of the Statute.

IV. Unilateral Change Regarding Recalling Telepager Issued To Union President

It is asserted by General Counsel that the issuance of the telepager to Union president Nather in October to conduct, inter alia, union business created a privilege which became a condition of employment. Further, the removal of the privilege was effected unilaterally by Respondent in violation of the Act. Contrariwise, the employer herein insists there was no unilateral action taken; that the union official never requested bargaining regarding such removal, and none would have been required.

In Veterans Administration, Veterans Administration, Regional Office, New York Region, A/SLMR No. 694 the president of the collective bargaining representative, who was also an employee, was provided a telephone to facilitate the transaction of union business. After concluding that some disruption occurred as a result of the phone, management removed it from the union president's desk. It was held that such accorded use of the telephone was a condition of employment which could not be unilaterally discontinued by the employer. Despite discussions with the union official after its removal, it was concluded that the phone was an irreversible fait accompli. As such it was a unilateral change constituting a refusal to bargain.

While the privilege granted the union president in the cited case endured for two years, as contrasted with the fact that Nather used the telepager for two months, the holding in the earlier case seems apposite herein. Respondent conferred a privilege upon the union president in the case at bar which, albeit of short duration, constituted a working condition. Nather utilized the telepager to conduct union business and communicate with other employees as their bargaining representative. Although the use thereof lasted for a short period, Respondent established the benefit as a working condition.

While not free from some doubt, I am persuaded that the discussions Nather had with Tremblay or Robertson, management's representatives, did not afford an opportunity for bargaining as to the discontinuance of the instrument. Thus, it is noted that Tremblay notified Nather to turn in the "beeper"; that the issuance thereof was an administrative mistake; and that a decision had been made to recall the item. Although Nather protested, neither Tremblay nor Robertson took the occasion to indicate that a discussion was in order. In truth, the withdrawal of the telepager was, as in the cited case, a fait accompli as far as management was concerned. I do not view the discussions which Tremblay or the Director had with Nather to constitute "bargaining" sessions, nor can it be concluded that Respondent was open to suggestions or considerations on the part of Nather in this regard. At that point the employer had already acted unilaterally in making its decision to recall the telepager, and the directive to the union official was in furtherance thereof. Accordingly, I conclude that the recall of the telepager was a unilateral act by Respondent which changed a condition of employment in violation of 7116(a) (1) and (5) of the Statute.

V. Refusal To Bargain Regarding Impact and Implementation of the Relocations and Reassignment of Respondent's Nursing Staff

It is asserted by the General Counsel that, commencing on November 13 and continuing thereafter, Respondent refused to negotiate as to the impact and implementation of its decision to renovate certain buildings at Canandaigua, N.Y. The renovation involved the reassignment of some nurses from one division to another which was accomplished on December 14. General Counsel contends, further, the employer by-passed the Union by soliciting volunteers for reassignment, and that the final action was unilateral in nature - all without affording the Union an opportunity to bargain as to the procedures to be followed with respect thereto.

Respondent maintains that it had no duty to negotiate the impact and implementation of its renovation because no condition of employment were changed. It insists the individuals remained as registered nurses, performed the identical duties, and were supervised by the same persons after the relocation. Moreover, it contends that any change, if it existed, was insubstantial - that only one full time and two part-time nurses were switched from a psychiatric to a medical ward. Finally, it is argued that management was willing to bargain regarding impact and implementation - although not required to do so - but never received an affirmative response in regard thereto from the Union.

In Department of Health, Education and Welfare, Social Security Administration, BRSI, Northeastern Program Service Center, A/SLMR No. 1101, the employer assigned five employees to a different area to work on special reports. It was argued that the assignment did not create a significant impact on personnel policies or working conditions. This argument was rejected. The action by management prompted concerns by the union as to whether assignments would be voluntary and rotational, the hours to be worked and whether overtime would be involved. It was held that such issued are substantial, and require negotiation thereon despite management's prerogative to make the assigment. The same holding prevailed in Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, A/SLMR No. 1045 where four inspectors were involuntarily transferred to other locations which were understaffed. It was concluded that the exclusive representative must be afforded the opportunity to negotiate regarding the procedures management intends to observe in effectuating its decision, and as to the impact upon employees adversely affected.[19]

While management may properly decide to relocate or reassign employees to other divisions or areas, it is clear that the procedures to be followed, and the impact upon employees adversely affected, must be negotiated with the collective bargaining representative. In the case at bar union representative Jensen raised concerns with Reiter on November 13 over several effects of the renovations and the resultant reassignment of the nurses. Thus, she raised questions as to (1) which nurses would be transferred, (2) the method of selection, (3) the opportunity afforded said nurses to return to their original unit, (4) uniform allowances, (5) holidays to be taken with days off to be different. Reiter's response to those concerns by the union representative, as well as subsequent events, belie any attempt by management to declare that it stood ready and willing to bargain on the procedures or the impact and implementation of the renovation and reassignments. He refused to disclose the names of those nurses involved, and informed Jensen that the head nurse and head supervisor would make the decisions as to which nurses would be transferred. At a later date, December 5, the parties and their representatives met to discuss these matters as a result of a written request by Alder to negotiate the "proposed reassignment of nursing service employees due to renovation project." The Union made suggestions in respect to the matters over which they had previously voiced concern. However, Respondent's officials stated the matter was not negotiable, and it was unfortunate that inconveniences occurred. Moreover, in a letter dated December 8 Chief of Personnel Wilson advised Nather that management did not believe there would be any adverse impact. In addition, Reiter informed Jensen by letter on December 8 that the impact, if any, on professional nurses must be an employee determination.

The foregoing convinces me that, contrary to Respondent's contention, management neither intended to, nor did, negotiate with the Union regarding impact and implementation of the reassignment precipitated by the renovation. While Reiter and Wilson made casual remarks that the reassignments were not permanent and requests could be made to return to original units later, and that the Union could advise management of any ill effects not considered, I do not view the meetings in November or December as constituting negotiation. Both officials of Respondent declared that no adverse impact was apparent to them; none of the proposals by the Union regarding the matters it deemed to impact adversely upon the nurses were discussed in depth; and, in truth, the employer's representatives emphasized that no impact was apparent, and if there were any, it should be decided by the employees.

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[19] See also Federal Aviation Administration, A/SLMR No. 418 which held that the duty to bargain embraces the procedures observed in deciding who would be reassigned, as well as the criteria to be followed in selecting men for transfer.

Nor do I agree with Respondent that any impact herein was insubstantial. Apart from the fact that four nurses were transferred from a psychiatric to a medical unit, ten nurses in Building 1C are now on a regular rotation basis. The duties imposed upon the nurses in the medical unit differ from those required in the psychiatric area. Moreover, the relocations to Building 1C resulted in Jensen losing a holiday previously arranged. The method of selection for reassignment, rotational schedules, holidays, and return to original station, are all serious matters creating a sufficient impact upon the employees involved. Thus, I conclude that, based on the foregoing, Respondent failed to bargain with the Union regarding the impact and implementation of its reassignment of nurses due to the renovation of the medical center - all in violation of Section 7116(a)(1) and (5) of the Act.[20]

VII. Refusal To Bargain Regarding Impact and Implementation of Reassignment Of Staff Nurse Suzanne Leicht To The Day Shift

While the General Counsel does not contest the Respondent's right to assign Leicht to the day shift, it is contended that the employer is obligated to bargain over the impact and implementation thereof. In making this assertion, the General Counsel further insists that the impact upon the remaining nurses on the rotational shift was both adverse and substantial.

Based on the record facts herein I do not agree with the foregoing contentions. The assignment of Leicht to the day shift endured for a relatively short period. By removing this employee from the rotational schedule, it was necessary for several nurses to work four weekends to absorb the time Leicht would have worked on a weekend. The record does not contain detailed data[21] to warrant the conclusion that Leicht's transfer to the day shift resulted in a substantial impact upon the other staff nurses on the rotational schedule. As Respondent avers in its brief, the assignment incurred no greater hardship than if a nurse in this section had left her employment. It may well be argued that Leicht's assignment as a trainee to become a clinical specialist impacted upon the other nurses in Building 37 at the Medical Center. However, I am constrained to conclude that the effect was insubstantial. Moreover, it must be shown that others, i.e. nurses at said location, were adversely affected. See Office of Program Operations, Field Operations, Social Security Administration, San Francisco Region, 5 FLRA No. 45. In this instance I find no such effect and conclude Respondent did not violate Sections 7116(a)(1) and (5) by failing to bargain with the Union regarding the impact of Leicht's transfer to the day shift.

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[20] In paragraph 13(e) of the Complaint it is alleged that Respondent, on November 13, 1980, bypassed the Union and dealt directly with employees by soliciting volunteers for reassignment. While management met with two social workers to discuss preparing discharge summaries, which has been treated *supra*, the record does not support the allegation set forth in 13(e). Accordingly, I find no violation in respect to bypassing the Union as alleged therein.

[21] While reference was made by Nather to an adverse effect upon the remaining nurses as a result of Thanksgiving and off-shifts, it is not clear to what extent the other nurses were required to work extra hours to accommodate Leicht's reassignment.

Having found that Respondent did not threaten Union steward Gary Yax with disciplinary action based on his union activities in violation of Section 7116(a)(1) of the Act; that Respondent did not, on or about December 19, 1980, engage in a "formal" discussion with unit employees, without giving the Union an opportunity to be present, in violation of Section 7116(a)(1) and (5) of the Act; that Respondent, on or about November 13, 1980, did not "bypass" the Union and deal directly unit employees by soliciting volunteers for reassignment in violation of Section 7116(a)(1) and (5) of the Act; that Respondent did not unlawfully refuse to bargain with the Union as to the impact and implementation of the assignment of staff nurse Suzanne Leicht to the day shift - it is recommended that paragraphs 12(a), 13(b), 13(e), and 13 (g) of the First Amended Complaint be dismissed.

Having found that Respondent violated Sections 7116(a)(1), (5) and (8) of the Act in the particular respects heretofore mentioned, it is recommended that the Authority issue the following Order.

ORDER

Pursuant to Section 7118(a)(7) of the Federal Labor-Management Relations Statute and Section 2423.29 of the Rules and Regulations, it is hereby ordered that the Veterans Administration Medical Center (Canandaigua, New York) shall:

1. Cease and desist from:

(a) Establishing criteria and instituting priority procedures for funding the education and training of its staff employees, and providing for a Travel and Education Committee, or any other body, without first notifying the American Federation of Government Employees, Local 3306, AFL-CIO, the exclusive bargaining representative of its employees, and affording such representative the opportunity to bargain, to the extent consonant with law and regulation, on the decision to effectuate such actions.

(b) Refusing or failing to furnish, upon request by the American Federation of Government Employees, Local 3306, AFL-CIO, or any other exclusive representative of its employees, a copy of a "Prioritization of Training" memorandum which is necessary to enable the American Federation of Government Employees, Local 3306, AFL-CIO, or any other exclusive representative, to fulfill its duties as the bargaining representative of the employees in the exclusively recognized unit.

(c) Assigning to social workers the duty of writing or preparing discharge summaries without first notifying the American Federation of Government Employees, Local 3306, AFL-CIO, the exclusive bargaining representative of its employees, and affording such representative the opportunity to bargain, to the extent consonant with law and regulations, on the impact and implementation of such assignment.

(d) Recalling or withdrawing a telepager issued to the president of American Federation of Government Employees, Local 3306, AFL-CIO, withut first notifying the American Federation of Government Employees, Local 3306, AFL-CIO, the exclusive representative of its employees, and affording such representative the opportunity to bargain, to the extent consonant with law and regulation, on the decision to make such recall or withdrawal.

(e) Relocating or reassigning staff nurses at the medical center without first notifying the American Federation of Government Employees, Local 3306, AFL-CIO, the exclusive representative of its employees, and affording such representative the opportunity to bargain, to the extent consonant with law and regulations, on the impact and implementation of such relocation or reassignment.

(f) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Act.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Act:

(a) Rescind, and withdraw Station Memorandum 80-48, issued on September 30, 1980, and its provisions, which established criteria and priority procedures for funding the education and training of its staff employees, and provided for a Travel and Education Committee to make recommendations concerning requests by the staff employees for educational activities.

(b) Restore the procedures, which existed prior to issuing Station Memorandum 80-48 concerning the education and training of staff employees, including the existence and recognition of the Hospital Education Committee and the Subcommittee for Professional Education, as set forth in Station Memorandum No. 79-127 dated October 30, 1979.

(c) Notify the American Federation of Government Employees, Local 3306, AFL-CIO, of any intended decision to change the criteria and priority procedures for funding the education and training of staff employees, and the establishment of any new committee to make recommendations concerning requests by the staff employees for educational activities, and, upon request, bargain to the extent consonant with law and regulations on the decision to effectuate such change.

(d) Upon request, furnish to the American Federation of Government Employees, Local 3306, AFL-CIO, a copy of the "Prioritization of Training" memorandum which is necessary to enable the American Federation of Government Employees, Local 3306, AFL-CIO, to fulfill its duties as the bargaining representative of the employees in the exclusively recognized unit.

(e) Rescind and withdraw the assignment to the social workers the duty of writing or preparing discharge summaries.

(f) Notify the American Federation of Government Employees, Local 3306, AFL-CIO, of any intended decision to assign the social workers the duty of writing or preparing discharge summaries, and, upon request, bargain to the extent consonant with law and regulations, on the impact and implementation of such assignment.

(g) Restore and reissue to the president of the American Federation of Government Employees, Local 3306, AFL-CIO the telepager previously issued for use by him while conducting official union business at the medical center.

(h) Notify the American Federation of Government Employees, Local 3306, AFL-CIO, of any future decision to recall or withdraw the telepager from the president of the American Federation of Government Employees, Local 3306, AFL-CIO, and, upon request, bargain with such representative, to the extent consonant with law and regulations, on the decision to effectuate such recall or withdrawal.

(i) Notify the American Federation of Government Employees, Local 3306, AFL-CIO, of any future decision to reassign staff nurses from one division or location to another at the medical center, and upon request, bargain with such representative, to the extent consonant with law and regulations, on the impact and implementation of such reassignment.

(j) Post at its facilities at Canandaigua, New York, copies of the attached notice marked "Appendix" on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Director of the Medical Center and they shall be posted for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. The Director shall take reasonable steps to insure that such notices are not altered, defaced, or covered by any other material.

(k) Notify the Federal Labor Relations Authority in writing, within 30 days from the date of this Order, what steps have been taken to comply herewith.

William Naimark

WILLIAM NAIMARK
Administrative Law Judge

Dated: December 9, 1981
Washington, D.C.

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY
AND IN ORDER TO EFFECTUATE THE POLICIES OF
CHAPTER 71 OF TITLE 5 OF THE
UNITED STATES CODE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT establish criteria and institute priority procedures for funding the education and training of our staff employees, and provide for a Travel and Education Committee or any other body, without first notifying the American Federation of Government Employees, Local 3306, AFL-CIO, the exclusive bargaining representative of our employees, and affording such representative the opportunity to bargain, to the extent consonant with law and regulation, on the decision to effectuate such actions.

WE WILL NOT refuse or fail to furnish upon request by the American Federation of Government Employees, Local 3306, AFL-CIO, or any other exclusive representative of our employees, a copy of a "Prioritization of Training" memorandum which is necessary to enable the American Federation of Government Employees, Local 3306, AFL-CIO, or any other exclusive representative, to fulfill its duties as the bargaining representative of the employees in the exclusively recognized unit.

WE WILL NOT assign to social workers the duty of writing or preparing discharge summaries without first notifying the American Federation of Government Employees, Local 3306, AFL-CIO, the exclusive bargaining representative of our employees, and affording such representative the opportunity to bargain, to the extent consonant with law and regulations, on the impact and implementation of such assignment.

WE WILL NOT recall or withdraw a telepager issued to the president of American Federation of Government Employees, Local 3306, AFL-CIO, without first notifying the American Federation of Government Employees, Local

3306, AFL-CIO, the exclusive representative of our employees, and affording such representative the opportunity to bargain, to the extent consonant with law and regulation, on the decision to make such recall or withdrawal.

WE WILL NOT relocate or reassign staff nurses at the medical center without first notifying the American Federation of Government Employees, Local 3306, AFL-CIO, the exclusive representative of our employees, and affording such representative the opportunity to bargain, to the extent consonant with law and regulations, on the impact and implementation of such relocation or reassignment.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL rescind and withdraw Station Memorandum 80-48, issued on September 30, 1980, and its provisions, which established criteria and priority procedures for funding the education and training of our staff employees, and provide for a Travel and Education Committee to make recommendations concerning requests by the staff employees for educational activities.

WE WILL restore the procedures, which existed prior to issuing Station Memorandum 80-48 concerning the education and training of staff employees, including the existence and recognition of the Hospital Education Committee and the Subcommittee for Professional Education, as set forth in Station Memorandum No. 79-127 dated October 30, 1979.

WE WILL notify the American Federation of Government Employees, Local 3306, AFL-CIO, of any intended decision to change the criteria and priority procedures for funding the education and training of staff employees, and the establishment of any new committee to make recommendations concerning requests by the staff employees for educational activities, and, upon request, bargain to the extent consonant with law and regulations on the decision to effectuate such change.

WE WILL, upon request, furnish to the American Federation of Government Employees, Local 3306, AFL-CIO, a copy of the "Prioritization of Training" memorandum which is necessary to enable the American Federation of Government Employees, Local 3306, AFL-CIO to fulfill its duties as the bargaining representative of the employees in the exclusively recognized unit.

WE WILL rescind and withdraw the assignment to the social workers the duty of writing or preparing discharge summaries.

WE WILL notify the American Federation of Government Employees, Local 3306, AFL-CIO, of any intended decision to assign the social workers the duty of writing or preparing discharge summaries, and, upon request, bargain to the extent consonant with law and regulations on the impact and implementation of such assignment.

WE WILL restore and reissue to the president of the American Federation of Government Employees, Local 3306, AFL-CIO the telepager previously issued for use by him while conducting official union business at the Medical Center.

WE WILL notify the American Federation of Government Employees, Local 33, AFL-CIO, of any future decision to recall or withdraw the telepager from the president of the American Federation of Government Employees, Local 3306, AFL-CIO, and, upon request, bargain with the representative, to the extent consonant with law and regulations, on the decision to effectuate such recall or withdrawal.

WE WILL notify the American Federation of Government Employees, Local 3306, AFL-CIO, of any future decision to reassign staff nurses from one division or location to another at the medical center, and upon request, bargain with such representative, to the extent consonant with law and regulations, or the impact and implementation of such reassignment.

____
(Agency or Activity)

Dated: ______________________ By: ______________________________
(Signature)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Region 1, whose address is: 441 Stuart Street, 9th Floor, Boston, MA 02116, and whose telephone number is: (617) 223-0920.

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